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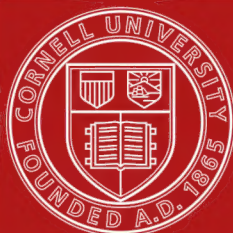
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THE
FEDERAL AND STATE
CRIMINAL REPORTER

REPORTS OF CRIMINAL CASES

DECIDED IN THE FEDERAL COURTS AND COURTS OF
LAST RESORT OF ALL THE STATES AND TERRI-
TORIES OF THE UNITED STATES.

WITH NOTES AND REFERENCES.

BY
WILLIAM H. SILVERNAIL.

Vol. I.

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FED. CRIM. REP., VOL. I—C.

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Supreme Court of Iowa.

(Filed December 13, 1895.)

STATE v. MEIER.

1. BAIL—BOND—SURRENDER OF DEFENDANT.

Under section 4587 of the Code, a bond on appeal from a judgment imposing a fine or imprisonment until it was paid, conditioned for the payment of said fine and the surrender of defendant; is not discharged merely by the surrender and imprisonment of defendant.

2. SAME.

Where, under such a bond, the defendant is surrendered and imprisoned, an order of the governor, suspending the imprisonment does not estop the state from suing on the bond.

APPEAL from the district court, Polk county; W. A. SPURRIER, Judge.

Action on a bond. Judgment against the defendants. The defendant Hoffman appeals.

J. F. Conrad and T. L. Sellers, for appellant.

Dowell & Parish and W. G. Harvison, for the State.

KINNE, J.—1. The record discloses the following facts: That defendant Meier was indicted and convicted in the district court of Polk county, Iowa, for a liquor nuisance. He was sentenced to pay a fine of \$300, \$25 attorney's fees, and the costs, and was

ordered imprisoned in the county jail of said county for 104 days unless said fine, attorney's fees, and costs were paid. Said Meier appealed from said judgment, and executed a bond, with the defendant and appellant Hoffman as surety. Said bond was conditioned as follows: "Now, therefore, in case the said Martin Meier shall well and truly pay said fine, or such part of it as the supreme court may direct, and if the said Martin Meier shall surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgments of the supreme court, then this bond to be void; otherwise, to be and to remain in full force and effect." On appeal to the supreme court the judgment below was affirmed. 55 N. W. 521. Thereafter the appellant Hoffman turned the defendant Meier over to the custody of the sheriff of Polk county, who placed him in jail to serve out the sentence, where he remained until July 11, 1893, when he was released upon an order from the governor of the state suspending sentence only "so far as the order of imprisonment is concerned." In this action a judgment was rendered against the surety, from which he prosecutes this appeal.

2. Appellant contends that, under the facts disclosed in record, the court erred in rendering a judgment against him; that he had, prior to the beginning of the proceeding to forfeit the bond, caused Meier to be surrendered in execution of the judgment. Furthermore, he claims that, by reason of the act of the governor, the state is now estopped from recovering against him. Our statute provides: "After conviction upon an appeal to the supreme court, the defendant must be admitted to bail as follows: (1) If the appeal be from a judgment imposing a fine, upon the undertaking of bail that he will pay the same, or such part of it as the supreme court may direct, and in all respects abide the orders of the judgment of the supreme court upon the appeal. (2) If the appeal be from a judgment of imprisonment, upon the undertaking of bail that he will surrender himself in execution of the judgment and direction of the supreme court, and in all respects abide the orders and judgment of the supreme court upon the appeal * * *." Code, section 4587. Now, it is contended that, when the appellant placed Hoffman in charge of the sheriff, he thereby discharged his obligation under the bond. We do not so construe the law and

the obligation entered into by Hoffman. Hoffman, as surety, by the express terms of his bond, agreed, if the cause against Meier was affirmed, to "pay said fine, or such part of it as the supreme court may direct," and to see that Meier surrendered himself in execution of the judgment. His bond was to be void only on the happening of both conditions. It is said that the bond is given under the second division of the section above quoted. That is not true. That division refers to a case where bail is given on a judgment for imprisonment alone. The case at bar is one where there was a fine imposed, and a judgment for imprisonment until it was paid. Hence the bond was properly framed so as to cover the case presented. Code, section 4588. It is true in this case that the imprisonment is the means provided by the statute for coercing payment of the fine, but it is settled by a long line of authorities that the undergoing of imprisonment in such a case by the defendant would not release him from the payment of the fine. *State v. Jordan*, 39 Iowa, 387; *State v. Anwerda*, 40 Iowa, 151; *City of Keokuk v. Dressell*, Iowa, 597; *Albertson v. Kriechbaum*, 65 Iowa, 18, 21 N. W. 178. The obligation of Hoffman was not in the alternative that he would pay the fine or deliver the defendant in the execution of judgment, but he expressly undertook to do both. Such being the case, Hoffman's liability was not satisfied by delivering the defendant to the sheriff, in execution of the judgment. We do not think this contention of the appellant requires further discussion.

3. Lastly, it is urged that the state should be estopped from recovering against Hoffman because of the action of the governor. The order of suspension of the governor, as we have shown, related only to the imprisonment. Before its issuance, Hoffman had complied with one condition of the bond,—he had surrendered his principal to the sheriff. Now, the action of the governor in releasing Meier from further imprisonment in no way affected any right of Hoffman. He was not induced thereby to change his position. He did nothing by reason thereof. The essential elements of an estoppel are wanting. As we have seen, Hoffman's liability to pay the fine was absolute in case the judgment was affirmed and his principal failed to satisfy it. Therefore, any action which the executor might take touching the imprisonment could in no wise

affect Hoffman's liability. We discover no error, and the judgment below is affirmed.

Supreme Court of Montana.

(Filed December 9, 1895.)

STATE v. PILGRIM.

1. APPEAL—NEW TRIAL.

Before the adoption of the Penal Code of 1895, an appeal from a judgment brings up for review the order denying the defendant's motion for a new trial.

2. SAME—WAIVER.

Defects in a motion for a new trial are not waived by a special appearance for the purpose of moving for a dismissal of the motion for such defects.

3. SAME—DENIAL.

A motion for a new trial is properly denied where the notice does not particularly state any error whatever.

4. STATUTE—CONSTRUCTION.

If one use of a punctuation will cause a statute to convey a meaning, and the other use of punctuation will simply give it a collection of words without sense, the former construction should, of course, be adopted, as effect must be given to the statute.

APPEAL from a judgment convicting defendant of a criminal offense, and from an order denying a motion for a new trial.

Largent & Huntoon, for appellant.

H. J. Haskell, W. D. Gardner and Jas. W. Freeman, for the state.

DE WITT, J.—The defendant was convicted of the crime of branding a calf of another with intent to feloniously steal the same. He appeals from the judgment. These proceedings were all before the adoption of the Penal Code of 1895, and therefore

the appeal from the judgment brings up for review the order denying defendant's motion for a new trial. The defendant gave notice of intention to move for a new trial. The county attorney thereupon appeared specially, and moved to dismiss the motion upon the ground that the notice of intention did not particularly state the errors relied upon. There was, therefore, no waiver by the state of the defects in the notice of intention to move. It is the fact that the notice did not particularly state any error whatever. The motion was denied, and properly so. *State v. Frey*, 10 Mont. 407; 25 Pac. 1055; *State v. Whaley*, (Mont.) 41 Pac. 852. There could be no better case than the present one to illustrate the propriety of the practice defined by the Code of requiring a defendant to specify particularly the errors relied upon. In this case the appellant claims there were 203 errors committed upon the trial. It would certainly be a vicious practice if he could move for a new trial, and not specify in his notice which one of the 203 errors he relied upon. The county attorney would have no information as to which alleged error was claimed to be substantial. Furthermore, on the argument before the district court counsel might present three of the errors, and then come before this court and rely upon the other 200. There may be isolated cases where the enforcement of the rules of practice may seem to be severe, although we do not suggest that this is such a case. But, if these statutory rules are to be neglected, or repealed, the courts would find themselves in inextricable confusion. The appellate courts and the trial courts would be working at cross purposes, and appeals would be prosecuted in this court upon questions never raised in the lower courts. With no specification of error in the notice of intention to move for a new trial, the district court was correct in denying the motion.

There was also a motion in arrest of judgment. The only ground set forth in the same is "that the facts stated in the information herein do not constitute a public offense or a crime." The statute under which the information is filed is section 86 of the Criminal Laws (Comp. St. 1887). It is as follows: "Every person who shall mark, brand, alter, or deface the mark or brand of any horse, mare, colt, jack, jennet, mule, or any one or more head of neat cattle or sheep, goats, hogs, shoats, or pigs not his or her

own property, but belonging to some other person, or cause the same to be done, with the intent thereby to steal the same, or to prevent the identification thereof by the owner, shall, upon conviction thereof, be punished by imprisonment in the state prison for a term not less than six months, nor more than five years." Appellant contends that under this statute no offense is charged in the information. We present his argument from his own brief, as follows: "Our contention is that that section can mean only that if any person shall mark the mark or brand, or brand the mark or brand, or shall alter the mark or brand, or shall deface the mark or brand of any animal mentioned in the section he shall be guilty of an offense. Any other construction would make strange reading, namely: 'Every person who shall brand of any horse,' 'Every person who shall alter of any horse,' and so on through the whole section. In other words, the punctuation is such as to preclude any other construction, for the reason the comma is after 'brand,' and if the other construction is to be placed upon it the comma should have been placed after 'of.' The comma being placed where it is, leaves us no other grammatical construction that will make sense of the paragraph, except that the animal must have been branded or marked at the time that the offense was committed, and that brand or mark must be by the party offending marked, branded, altered or defaced." His argument, is, however, only a criticism of punctuation. The comma following the word "brand," used the second time in the section, should follow the word "of" which succeeds the word "brand." The comma after the word "alter" should be omitted. Then that portion of the statute would read as follows: "Every person who shall mark, brand, alter or deface the mark or brand of, any horse, mare," etc. We understand that the offenses described in the statute are "to mark any horse," etc., "to brand any horse," etc., "to alter or deface the mark or brand of any horse," etc. The punctuation of a statute is not entitled to great weight in its construction. *Taylor v. Ashby*, 3 Mont. 248. The punctuation which is given the statute in the preceding remarks makes it convey a sense. The punctuation as printed in the statute book robs the statute of all meaning and sense. To make it read: "Every person who shall brand of a horse," etc., is an absurdity. If one

use of a punctuation will cause a statute to convey a meaning, and the other use of punctuation would simply give a collection of words without sense, the former construction must, of course, be adopted. An effect must be given to the statute. *Hedges v. Commissioners*, 4 Mont. 280; 1 Pac. 748; *Manton v. Tyler*, 4 Mont. 364; 1 Pac. 743; *Lane v. Commissioners*, 6 Mont. 473; 13 Pac. 136. We are therefore of opinion that the motion in arrest of judgment was properly denied.

The judgment is therefore affirmed.

PEMBERTON. C. J. and HUNT, J., concur.

Supreme Court of Montana.

(Filed December 9, 1895.)

STATE v. CADOTTE.

1. TRIAL—JURY.

The fact that a juror is a brother-in-law of the county attorney, who is prosecuting, does not disqualify him from acting as such juror.

2. WITNESSES—CHILD.

In a criminal case, a boy fifteen years old, who states that the oath taken requires him to tell what is so, and that what is so is the truth, and what is not so is falsehood, and if he does not tell the truth he will be punished, is a competent witness.

3. EVIDENCE—HOMICIDE—CLOTHING.

The clothing of the deceased, when fully identified, is admissible in evidence to show the course of the bullet which caused his death.

4. SAME—KNIFE.

On a trial for murder, a knife which is not clearly identified as the one claimed to have been in the hands of the deceased when killed, is not admissible in evidence.

5. WITNESS—CREDIBILITY—CONTRADICTORY STATEMENTS.

Where, on the trial for murder, the defendant relying on self defense for acquittal, becomes a witness in his own behalf, it is competent to attack his credibility by proving statements made out of court as to the self defense, contrary to those which he had made as a witness on the trial.

6. TRIAL—REMARKS OF PROSECUTING ATTORNEY.

Where no exception is taken and no request for a reprimand made, improper remarks of the prosecuting attorney will not be considered.

7. TRIAL—CHARGE.

Under section 362 of Penal Code of 1895, on the trial for murder where the defendant attempts to testify on the ground of self defense, an instruction applying the measure of the circumstances justifying a killing in self defense to an individual of the class of men to which defendant belongs, instead of "a reasonable person," is properly refused.

8. SAME.

An instruction, which informs a jury that if they do not find the defendant guilty of murder in the first degree under the information, they could find him guilty of murder in the second degree, or manslaughter, or not guilty, is proper.

Appeal from a judgment, adjudging defendant guilty of murder in the first degree, and from an order denying a motion for a new trial.

John B. Tattan and W. B. Sands, for appellant.

H. J. Haskell and B. L. Powers, for the state.

DE WITT, J.—The defendant was convicted of the crime of murder in the first degree. He appeals from the judgment and from an order denying him a new trial. Pen. Code 1895, § 2272. Counsel for appellant, who was appointed by the district court, also appeared in this court, and argued the appeal. He has conscientiously presented such matters as appeared to him to be worthy of consideration. There is, indeed, but little, in the appeal that merits serious attention; but the gravity of the offense is perhaps a reason for treating to some extent the questions which appellant's counsel has called to our attention. They will be treated in their order, as follows:

Juror Johnson was challenged for cause, because he was a brother-in-law of the county attorney, who was prosecuting. The court denied the challenge. Appellant alleges error. This fact did not disqualify the juror. Penal Code 1895, § 2046 et seq. Furthermore, the examination of this juror upon this voir dire does not at all tend to show any bias, either implied or actual. Id. § 2048.

Objection is also made to the ruling of the court in allowing Nelson Grandchamp, a boy fifteen years of age, to testify. Section 2440, Penal Code 1895, is as follows: "The rules for determining the competency of witnesses in civil actions are applicable also to criminal actions and proceedings, except as otherwise provided in this Code." Section 3162, Code Civ. Proc. 1895, is as follows: "The following persons cannot be witnesses: 1. Those who are of unsound mind at the time of their production for examination. 2. Children under ten years of age, who appear incapable of receiving just impressions of the facts respecting which they are examined, or of relating them truly." It is argued by appellant that this witness did not sufficiently understand the nature of an oath, and his duties and obligations as a witness. The witness, upon being asked if he understood what he had done when he took the oath as a witness, answered that he did, and that he knew the difference between truth and falsehood, and the difference between telling the truth and telling a lie; and that he knew he was there to tell the truth, and that he knew the truth was that which was so, and not that which was not so, and that he understood he was there to tell what was so. He said the truth did not mean to tell something he did not know, but, on the contrary, meant to tell what he knew. He said he knew that if he did not tell the truth he would be punished. There was a long examination of the witness, and the answers were to the effect above noted. Counsel finally frightened and confused the witness by his questions, so that he stood mute, but when examined by the court and the county attorney he very clearly qualified himself in the testimony above given.

The clothing worn by the deceased at the time of the killing was introduced in evidence. Defendant's counsel objected to its introduction, on the ground that it was not sufficiently identified as the garments worn by the deceased when he was killed. The coroner, as a witness, testified that he had with him the clothes that he took off of the body, and thereupon produced them, and said they were taken from the body. Mrs. Julia Grandchamp, afterwards called as a witness, said that she knew the clothes that the deceased was wearing, and that they were the same clothes

that were produced by the coroner in the court room. There is no question about the clothes being identified. The alleged lack of identification was the only objection. They were offered for the purpose of shedding some further light upon the course which the bullet took through the body of the deceased.

The defendant desired to introduce in evidence a knife, it being claimed that the deceased had a knife in his hand when defendant shot him. The court refused to allow the knife to be introduced, for the reason that it had not been shown that it was the knife which the deceased had at the time of the killing. It very clearly appears that the identification of the knife was wholly insufficient. The defendant himself said he could not tell whether it was the knife or not.

The county attorney asked a witness—Isadore Sorell—whether he had heard the deceased, in the presence of certain parties named, make the following statement to Maj. Carter: "I shot Oliver Grandchamp as he was running towards the house, after I had told him to stop." The question was asked by the county attorney, and objected to by the defendant's counsel, and the objection sustained. The error which the appellant now claims is the allowing the question to be asked. But the question was asked before objection could be made. It was never answered, and at the request of the defendant's counsel the court cautioned the jury that they should pay no attention to the question. There was no error committed here of which the defendant can complain.

There was a considerable volume of testimony offered by the state to which objections were similarly made, but it all comes under one principle, and may be set forth in one statement. The defendant went upon the stand himself. He admitted that he shot and killed Oliver Grandchamp. His defense was self-defense. He stated upon his examination as a witness what he claimed to be facts in regard to the killing, and in regard to what he claims was his self-defense. Thereupon the county attorney asked him a number of questions to the effect of whether he had not made certain statements (reciting them) at certain times and places, in the presence of certain people. These statements, as recited by the county attorney, appeared to

be the defendant's accounts of the killing, given at such other times and places prior to the trial. The statement of the defendant which the county attorney desired to show that he had made was repeated in full in the question. Witnesses were afterwards called by the state to prove that defendant had, prior to the trial, and at the times and places, and in the presences mentioned, made the statements about the killing as to which defendant had been interrogated. The fact is that these alleged statements made by the defendant before the trial in some respects did not differ largely from his evidence given on the trial. Defendant's counsel made two objections to this class of testimony. The first objection was that a portion of the testimony was a confirmation, and not a contradiction, of the testimony given on the stand. If it were a confirmation, it certainly could not be objected to by the defendant. He was getting the benefit of a self-serving declaration. The other objection was that a portion of this testimony was a confession by the defendant, and it was not shown that such confession was made freely, deliberately, and voluntarily, and without the influence of promises or threats. In the first place, we are of the opinion, even if it were a confession, that it very sufficiently appeared that whatever statements defendant had made before the trial were voluntarily, freely, and deliberately, and not under the influence of threats or promises. In the second place, we are satisfied that the statements of the defendant sought to be proved were not confessions at all. Instead of being confessions of guilt, they were statements of his self-defense, statements in which he admitted the killing, and endeavored to show that he was obliged to kill to save his own life. They were admissions, to be sure, of the killing, but self-defending statements as to the same. And this was precisely the position he occupied upon the trial. He relying on self-defense for acquittal, it was competent to attack his credibility by proving statements made out of court as to the self-defense, contrary to those which he made as a witness on the trial.

Another reason presented by the appellant for granting a new trial is misconduct of the county attorney. It appears that upon the argument the county attorney used the following language: "We, too, are superstitious; and it is an old saying, and by some

believed to be true, that a man to be hung is known by his neck." Counsel has here stated that defendant had a birthmark upon his neck. His contention is that under these circumstances the remarks of the county attorney to the jury were such misconduct as should grant a new trial. But the judge, in settling the bill of exceptions, states that no exception was taken by the defendant's counsel to these objectionable remarks by the county attorney. The court was not requested to reprimand the county attorney, or to stop him in the remarks which he was making, nor was there any request that the jury be cautioned to disregard the language. The remarks of the county attorney in commenting upon personal deformities of the defendant on trial were certainly reprehensible. But, defendant's counsel being present, and there being no exception taken, and no complaint at the time when the matter could have been remedied under the circumstances in this case we are of opinion that the judgment should not be reversed. *State v. Jackson*. 9 Mont. 508; 24 Pac. 213.

The defense being self-defense, the court very fully instructed the jury upon this subject, and upon the question of the imminence and urgency of the presumed danger which would justify one in killing. In addition, the defendant requested the following instruction: "The court further instructs you that in judging the degree or sense of danger stated in instruction on page fourteen it must be that sense of danger appearing to the defendant at that time, and to men or individuals of his race, standing, individuality, and intelligence, and with this qualification you will consider the instruction as he threats on page fourteen of these instruction." This was refused, and we think properly. The Penal Code of 1885 provides, in section 362, as follows: "A bare fear of the commission of any of the offenses mentioned in subdivisions two and three of the preceding section, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone." As noted above, the court amply instructed under the meaning and spirit of this section of the statute. The additional instruction requested and refused asked the court to put this defendant upon a wholly different standing than that provided

by law as to all defendants. The situation must be such as to excite the fears of a reasonable person. The instruction refused would put the matter not as to a reasonable person, but rather as to such a person as this defendant was.

The appellant also complains of the following instruction: "Under an information charging the defendant with murder in the first degree you can also find the defendant guilty of murder in the second degree, or manslaughter, or you can find the defendant not guilty, if you do not find the defendant guilty of murder in the first degree." He contends that under this instruction the court told the jury, in effect, that they could find the defendant either guilty of the murder in the first degree or acquit him altogether, and did not leave it to the jury to find him guilty of murder in the second degree or manslaughter. We think the criticism of the instruction is verbal, rather than meritorious. The language is not artistic. The last clause of this sentence is misplaced. It should have been at the commencement; then the instruction would have been wholly clear. But, even as it is, we think it was not subject to misunderstanding. It sufficiently informed the jury that under the information, if they did not find the defendant guilty of murder in the first degree, they could find him guilty of second degree, or manslaughter, or not guilty. The judgment and the order denying the new trial are affirmed.

Under Pen. Code 1895, §§ 2254, 2325, 2278, and 2327, there is nothing for this court to do beyond rendering the judgment of affirmance. If, by reason of the stay caused by the appeal, the time set for execution has passed before this decision is made, the further proceedings are to be conducted in the district court.

Affirmed.

PEMBERTON, C. J., and HUNT, J., concur.

Supreme Court of Kansas.

(Filed December 7, 1895.)

CITY OF BURLINGTON v. STOCKWELL.**JURISDICTION—MISDEMEANOR.**

A judgment of the district court imposing upon the defendant a fine and costs for the violation of a city ordinance is a conviction for a misdemeanor, within the meaning of section 9 of chapter 96, Sess. Laws 1895, conferring jurisdiction upon the courts of appeals.

Appeal from a judgment convicting defendant of violation of an ordinance of the city of Burlington.

G. E. Manchester, for appellant.

S. D. Weaver, for appellee.

MARTIN, C. J. — The defendant was convicted in the police court of the city of Burlington, under an ordinance, for keeping swine within the city in such manner as to constitute a nuisance. He appealed to the district court, and was again convicted, and was adjudged to pay a fine of five dollars and the costs of prosecution, taxed at \$117.38. He then appealed to this court. Soon after the creation of the courts of appeals, the case was certified to the court for the Southern department, Eastern division. Afterwards, on August 6, 1895, that court returned the case here, holding that it had no jurisdiction. 1 Kan. App. —; 41 Pac. 221.

Section 9 of the act creating the courts of appeals, being chapter 96, Sess. Laws 1895, conferred upon them exclusive jurisdiction "in all cases of appeal from convictions for misdemeanors in the district and other courts of record." We think that the word "misdemeanor" was here used by the legislature in its general sense, and not in the particular one employed in classifying offenses under the laws of the state in article 1 of the Code of Criminal Procedure. Bouvier says this term is used to express every offense inferior to felony punishable by indictment or by particular described proceedings; and Blackstone says that in common usage

the word "crime" is made to denote offenses of a deeper and more atrocious dye, while small faults and omissions, of less consequence, are comprised under the gentler name of "misdemeanors." Violations of valid city ordinances are certainly offenses, although the laws of the state do not directly prescribe a punishment, which is a requirement of the definition of that word in section 2 of the Criminal Code. These offenses against a city are not crimes or felonies, but are commonly classed as misdemeanors, and the procedure for the enforcement of city ordinances is criminal in its nature. A review must be sought by the defendant by appeal. A finding in his favor ends the case, as to him, beyond the right of appeal by the city, and the other incidents of a criminal trial usually follow. *City of Burlington v. James*, 17 Kan. 221, 222, and cases cited; *In re Rolfs*, 30 Kan. 758, 761; 1 Pac. 523. A main purpose of the creation of the courts of appeals was to aid in the disposition of the cases brought up from the lower courts for review, which had accumulated to an extent disproportioned to the working capacity of the existing judicial force. Those parts of the act conferring jurisdiction on these new tribunals ought, therefore, to be constructed liberally, with a view to promote the object in view. From the general tenor of the act as to criminal cases, it seems manifest that the legislature intended to leave for this court only felonies and appeals taken by the state. This case will therefore be recertified to the proper court of appeals.

All the justices concurring.

Court of Appeals of Kansas, Southern Department, E. D.

(Filed December 4, 1895.)

STATE v. ZIMMERMAN.

1. WITNESS—CROSS EXAMINATION.

It is error to permit a witness to be examined on cross examination, in regard to matters collateral to the main issue, and which have not been touched upon in the direct examination of the witness.

2. WITNESS—CREDIBILITY—CONTRADICTORY STATEMENTS.

Where a witness is examined upon his cross examination, with regard to matters which are immaterial to the issue in the case, the parties so examining the witness is bound by his answer, and cannot afterwards be permitted to introduce testimony in rebuttal to contradict such statements of the witness.

Appeal from a judgment, adjudging defendant guilty of assault and battery.

Fuller & Randolph and J. D. McCleverty, for appellant.

W. H. Morris, for the state.

COLE, J.—The defendant was convicted in the district court of Crawford county of an assault and battery alleged to have been committed on one Willard Kimball. He appeals to this court upon the ground principally that the trial court permitted the introduction of certain incompetent evidence on the part of the state over the objection of the defendant, the admission of which was prejudicial to the defendant's rights. The first objection raised by the defendant was to the admission of the details of the assault as related by the prosecuting witness, and the testimony of Dr. Cole with reference to the physical condition of the prosecuting witness shortly after the assault. It appears that the actual assault was committed by two sons of the defendant, and it was not claimed by the state that this defendant participated therein, but it was claimed that he was present, and consented thereto, and abetted his sons in the commission thereof. The defendant now claims that the evidence above referred to was incompetent, for the reason that the assault was admitted, and that the evidence of the details, as well as of the condition of the defendant after the commission thereof, could only have a tendency to prejudice the jury against him. This position is not correct. The defendant had entered a plea of not guilty, and the record nowhere discloses that any admission was made that an assault had been committed upon the prosecuting witness. It was therefore incumbent upon the state to prove every material allegation of the complaint, and it was perfectly proper for the court to admit testimony tending to prove the condition of the defendant as showing the gravity of the offense.

The next objection which is urged by the defendant is that the court permitted the state to introduce upon rebuttal the evidence of John Sweeny and William Getty tending to prove that the defendant was present as stated by the prosecuting witness. It is claimed by the defendant that this was evidence in chief, and ought not to have been admitted at the time it was, over his objection. The order of proof is to a great extent a matter discretion with the trial court. In this case, however, these two witnesses were not introduced for the purpose alleged by the defendant. The defendant was a witness in his own behalf, and testified that he had not seen his two sons who committed the assault from some time in the morning until supper time on the day in which the assault was committed, and the testimony of the witness Sweeny and the witness Getty tended to establish the fact that he saw and conversed with the two sons a short time prior to the commission of the assault. The fact that this evidence also tended to prove that defendant was present when the assault was committed could not make it incompetent for the purpose for which it was offered.

The next objection is that the witness William Cochran was asked upon cross-examination whether he had not stated that the Zimmerman boys had said at supper the evening of the day of the assault that they had pounded Willard Kimball, and whether he did not tell one Henry Bales that he (the witness) and the defendant stood by and saw all of the fight. The defendant claims that these questions elicited evidence which was neither relevant nor competent, but we cannot agree with the position in this regard. The witness William Cochran had testified upon direct examination that he was present at the house of the defendant upon the evening of the assault during the whole of the time when the family were having supper, and that during said time the two sons of the defendant who committed the assault came in and sat down to supper, but that no conversation took place as to the assault at any time during the evening. He had also testified upon his direct examination that the defendant and himself were at another place than that where the assault was committed at the time when it was committed. It was therefore competent to ask

him upon cross-examination if he had not made statements of a different character outside of court.

We come now to what seems the most serious objection in this case. The defendant produced as a witness in his behalf one Frank Cochran, and his testimony upon his direct examination was directed wholly to the details of a trip taken by himself and the defendant upon the day of the assault to the town of Hepler, from which place the witness testified they returned about six o'clock. Upon cross-examination he was asked if he did not tell Mr. Perkey that his brother, William Cochran, had told him that he, William Cochran, and the defendant, were present and witnessed the assault, and upon being recalled for further cross-examination he was asked if he did not tell Oscar Long the same in substance. These questions were objected to by the defendant at the time, and we can see no reason why the witness was permitted to answer them. The evidence thus elicited was not material to the assault, and ought not to have been permitted. In connection with this the defendant further complains that the state was permitted upon rebuttal to introduce over his objection the evidence of Mr. Perkey and Oscar Long to contradict the testimony given by Frank Cochran in answer to the question above referred to. The principle is so well settled as to have become elementary in its nature that a party is bound by the answers made upon cross-examination on matters not material to the issue, and cannot be permitted to introduce evidence for the purpose of contradicting testimony of that character. The court erred in admitting the testimony of the witnesses Perkey and Long, and under all the evidence in this case we are of the opinion that such error was prejudicial to the rights of the defendant.

The defendant further complains that the charge of the court to the jury was not sufficiently full for a criminal case. While we are of the opinion that the court might have been more specific, yet the defendant is in no position to complain, as he might have presented proper instruction of the kind desired for the court to give; and where this is not done we cannot presume that the rights of the defendant were prejudiced when the charge which was given correctly stated the law. For the error in admitting the testimony of the witnesses Perkey and Long, as well as per-

mitting the witness Frank Cochran to testify upon immaterial matters upon cross-examination, the judgment of the lower court must be reversed, and the cause remanded for a new trial. It is so ordered. All the judges concurring.

Supreme Court of California.

(Filed December 10, 1895.)

PEOPLE v. WARD.

1. INDICTMENT—BRIBERY.

Under sections 950 and 952 of the Penal Code, an indictment, which charges that defendant did give a bribe to a certain supervisor, with intent to corruptly influence him in a certain matter, is not sufficient.

2. SAME.

An indictment is good if it alleges all the facts or acts necessary to constitute the particular offense charged, in the language used by the legislature in defining it.

3. SAME.

An indictment for bribery should aver that the defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act, described by the statute as constituting the offense. A mere use of the language of section 165 of the Penal Code, which prescribes the punishment, is not charging the offense "in the words of the statute defining it."

Appeal from a judgment adjudging defendant guilty of giving a bribe.

W. M. Gibson and J. G. Swinnerton, for appellant.

W. F. Fitzgerald, Atty. Gen., for the People.

McFARLAND, J.—The appellant was convicted of the "crime of giving a bribe," and appeals from the judgment, and from an order denying a motion for a new trial. The appellant demurred to the indictment upon the ground that it does not substantially comply with the requirements of sections 950 and 952 of the

Penal Code. His demurrer was overruled, and we think that the court erred in overruling it. The indictment charges that the appellant did willfully, feloniously, etc., "give a bribe," to a certain member of the board of supervisors, with intent to corruptly influence him in a certain matter; but it does not contain any averment of any act of appellant which brings his alleged conduct within the legal meaning of bribery. The indictment would be the same if it had merely charged generally that defendant "bribed" a certain person to do a certain thing. This would be the averment of a legal conclusion only, and as bad as a mere general averment that a defendant "murdered" somebody or "stole" something. Section 950 of the Penal Code provides that the indictment shall contain "a statement of the acts constituting the offense in ordinary and concise language"; and section 952 provides that "it must be direct and certain as it regards *

* * * (3) the particular circumstances of the offense charged when they are necessary to constitute a complete offense." Subdivision 6 of section 7 of the Penal Code provides as follows: "The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity;" and section 165 provides that "every person who gives or offers a bribe" to one of several officers named, with intent, etc., is punishable in a certain manner. And counsel for respondents contend that the indictment is good because, as they say, "it follows the language of the statute." This court has said several times, in general terms, that an indictment is sufficient if it substantially follows the language of the statute. This is true generally, but not universally. It is not true of a case where "the particular circumstances

* * * are necessary to constitute a complete offense." The rule especially applies to purely statutory offenses. But what does the rule mean? It means simply this: that when the statute defines or describes the acts which shall constitute a particular offense, it is sufficient, in an indictment, to describe those acts in the language employed in the statute, — applying them, of course, concretely to the person charged. One of the earliest

cases on the subject is *People v. Parsons*, 6 Cal. 487. In that case the indictment was for perjury and left out the word "feloniously"; and it was held good because, in the statutory definition of the crime of perjury, the word "feloniously" was not used. In its opinion the court said: "The indictment in this cause charged the offense in the words of the statute defining it. *

* * * Time, place and circumstance are stated with certainty, and every information is given to the defendant which is necessary to enable him to answer the charge." There the words of the statute defining the offense were used in the indictment. *People v. Shaber*, 32 Cal. 36, is another early case. There the court in sustaining the indictment said: "The indictment charges the offenses in the very terms used in defining it in the fifty-eighth section of the crimes act." And even in that case *Sanderson, J.*, dissented, saying that it was a familiar principle in all pleadings that "the facts are to be stated, to the exclusion of conclusions of law to be drawn therefrom." And in the cases following these earlier ones it will be found that the rule declared on the subject is simply that an indictment is good if it alleges all the facts or acts necessary to constitute the particular offense charged, in the language used by the legislature in defining it. For instance, the meaning of the rule is fully stated by *Paterson, J.*, in *People v. Fowler*, 88 Cal. 138; 25 Pac. 1110, as follows: "The information follows the language of the statute, and is sufficient. It alleges all the acts and facts which the legislature has said shall constitute the offense."

The only two cases cited where bribery was involved are *People v. Edson*, 68 Cal. 549; 10 Pac. 192; and *People v. Markham*, 64 Cal. 157; 30 Pac. 620. In the *Edson* case the language of the indictment is not given, but the opinion refers to the *Markham* case as authority; and in the *Markham* case the indictment charged that the defendant, at a certain time and place, being a police officer, etc., did "agree to receive a bribe, to wit, fifteen standard dollars, lawful coin of the United States of America." Therefore, assuming the general rule, as above explained, to be that it is sufficient to allege an offense in the language of the statute, the offense charged in the case at bar is not alleged in the language of the statute in the indictment under review. It does

not allege "the acts and facts which the legislature has said shall constitute the offense." The material acts or facts constituting the legislative definition of bribery are the giving to a public officer something "of value, or advantage, present, or prospective," or giving "any promise" or entering into any "undertaking" to give something of value or advantage. There is no averment that appellant gave the supervisor anything of value, or of advantage, or that he gave anything at all, or that the thing was of present or prospective advantage, or that it was a promise to do something, or an undertaking of some kind which was, or would be, beneficial to the supervisor. As said by counsel for appellant: "The defendant is not informed whether the people will prove that he gave money, a promise of employment, a promise of political influence, a contract, instruction, entertainment, or any other of the many things which might constitute a bribe. It is true that the rules of the common law with respect to criminal pleading have been greatly relaxed in this state by legislation and judicial decision, and many of the formalities and particularities formerly deemed necessary are not now required; but the fundamental rule that an indictment must state with reasonable certainty what the defendant is charged with, so as "to enable him to answer the charge," has not been abrogated either by legislature or court. *People v. Lee* (Cal.), 40 Pac. 754. An indictment for bribery should aver that the defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act, described by the statute as constituting the offense. A mere use of the language of section 165, which prescribes the punishment, is not charging the offense "in the words of the statute defining it."

The judgment and order appealed from are reversed, and the cause is remanded, with instructions to sustain the demurrer to the indictment.

We concur: **TEMPLE, J.; HENSHAW, J.**

Supreme Court of Oregon.

(Filed December 23, 1895.)

THE STATE ex rel. **IDLEMAN**, Attorney General, v. **BAN-**
NON.**ATTORNEYS—DISBARMENT.**

Any information for the removal of an attorney on the ground of his having been convicted of a misdemeanor involving moral turpitude, which simply charges that he has been convicted of a misdemeanor, but does not allege that any moral turpitude was involved in the acts constituting such crime, is insufficient.

Original information in the supreme court by the state of Oregon on the relation of C. M. Idleman, attorney general, to disbar P. J. Bannon, an attorney at law, Defendant demurs to the information. Demurrer sustained.

C. M. Idleman, for relator.

B. F. Dowell and P. J. Bannon, for def't.

PER CURIAM.—This is a proceeding to disbar an attorney, instituted by the state upon the relation of the attorney general. The information states, in substance, that P. J. Bannon, an attorney of this court, was indicted, tried, and convicted in the district court of the United States for the district of Oregon of the crime of conspiracy, in confederating and combining with others to commit an offense against the United States by unlawfully aiding and abetting the landing in the United States of Chinese laborers not lawfully entitled to enter therein. The defendant, upon being cited to appear, demurred to the information for the reason that it did not state that the crime of which he was convicted was a felony or misdemeanor involving moral turpitude. The statute authorizes this court to remove or suspend an attorney upon his being convicted of any felony, or of a misdemeanor involving moral turpitude. Hill's Ann. Laws, Or. § 1047. The information charges the defendant with having been con-

victed of a misdemeanor, but does not state that any moral turpitude was involved in the unlawful agreement, or in any act of the conspirators resulting therefrom. It is not every misdemeanor that authorizes the suspension or removal of an attorney, but those only that involve moral turpitude. This is a material averment in pleading the conviction of a misdemeanor, without which the information fails to state a cause sufficient to give this court jurisdiction, and hence the demurrer must be sustained.

Supreme Court of Michigan.

(December 17, 1895.)

PEOPLE v VAN DAM.

1. EVIDENCE—BURGLARY.

On the trial of an information for breaking into a store in the night, with intent to commit larceny, bottles of peppermint, brought from the store at the time of the trial, are admissible to identify similar bottles found in defendant's house after the burglary.

2. BURGLARY—ADJOINING DWELLING.

Where two stores which have a stairway between them, leading up from the street to the second story and descending at the rear, and the second story of each of which is occupied as a dwelling and is accessible only from the stairway, having no entrance from the stores, are within the provisions of section 9134 of 2 How. Ann. St.

3. EVIDENCE—GOOD CHARACTER.

Evidence of good character is admissible, not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt.

Appeal from a judgment convicting defendant of burglary and larceny.

Nathan P. Allen, for appellant.

Fred. A. Maynard, Atty. Gen., and Alfred Wolcott, Pros. Atty., for the People.

LONG, J.—The information contains two counts,—one for breaking and entering the store of Hiram C. Luce in the night time, with intent to commit the crime of larceny, said store not adjoining to or occupied as a dwelling house; and the other for the larceny of goods of more than \$25 in value. Respondent was convicted under both counts, and the case comes to this court on exceptions before sentence.

The store burglarized is situated on the corner of East and Fifth streets, in the city of Grand Rapids, and is a two-story structure, consisting of two stores. A flight of stairs leads up from the street in front, and between the two stores, and a flight leads downward between the stores at the rear. Over the stores rooms are fitted up, in which Norman E. Briggs, the clerk of Mr. Luce, lives with his family. There are five rooms, and they are entered from the two stairways. From the record, there seems to be no entrance from the store to these rooms, and the only means of getting from the stores to the rooms is to pass out, either upon the street, or into the back yard, and thence up one of the stairways. The respondent resided some three-quarters of a mile from these stores. He was employed in a furniture factory, and had been so employed for a number of years, was a married man, having a wife and three children, and lived in his own house. The burglary was committed on the night of October 7, 1894. On the 2d of November, following, some suspicion having attached to him, a warrant was taken out and placed in the hands of detectives, who went to his house to make a search for the goods taken. Arriving there, they found the respondent was not at home, and told his wife their desire to make the search, and were permitted to do so. The house below consisted of a front room, a dining room, pantry, and bed room. A stairway led from the front room up stairs, where there were two rooms and a closet. The upper rooms were plastered, but contained nothing but a work bench and carvers' tools, saws, chisels, etc. The respondent is a carver. The officers then entered the closet over the stairs, and found two boards that had been sawed. Taking these off, they found many articles stored away under the floor of the closet, and on top of the lath and plastering of the rooms below. They found some

thirty or thirty-five pounds of coffee, tobacco, canned goods, tea, cigars, pipes, and essence of peppermint.¹ Other tobaccos, marked "Spearhead" and "Tiger," were found. The articles were in two different bags. The officers testified that, soon after discovering these articles, the respondent came home and wanted to know what they were doing there. They told him they were searching for stolen goods. He told them that he had none there, and that they could search his house. They then told him that they had searched the house and found the goods, and brought out the bags and showed them to him, and told him his wife had said that he brought them home. Respondent then asserted that two men had rented these rooms up stairs. They told him that his wife had said she asked him who helped him to get these, and he stated to her that if he told her she would not know who it was. The officers took the respondent into custody, and upon arriving at police headquarters searched him, and found in his pockets a half package of Tiger tobacco, like that found in the closet, when he said he had permission to get some every time he wanted to use it. The goods found under the closet floor were identified by Mr. Luce and Mr. Briggs as the property of Mr. Luce, taken from the store. The officers testified, further, that, in the search for these goods, they found a secret staircase from the closet, which could only be found by pulling off the boards.

On the trial the people offered in evidence the articles which Luce and Briggs identified, and also the half package of tobacco found upon the respondent when arrested; also, the two bottles of peppermint essence which were left in the store. The testimony tended to show that these were of like character and in like condition as those found concealed at respondent's house. This was objected to and admitted, and upon this is based the first assignment of error. We think this was competent evidence. Mr. Luce testified that the peppermint essence had been in his store three or four years; that that found at respondent's house had been taken from his store. The bottles were offered in evidence for the purpose of identifying those found with respondent, and all of them appear to have been upon the shelves for a length of time, having some marks upon them, and covered with fly-specks. We think the testimony does not bear out the statement that they

were offered for the purpose of comparing the figures upon the bottles, as each bottle contained the figures "10." The court properly permitted the people to put the two bottles in evidence for the purpose of showing their general appearance.

2. It is contended that the stores were adjoining to or occupied with a dwelling house. We think the testimony fails to show that fact, within the meaning of section 9134, 2 How. Ann. St.¹ *People v. Nolan*, 22 Mich. 228.

3. The principal question raised relate to the charge of the court. We need discuss but one, as we think the other objections are devoid of merit. The court charged the jury as follows: "Now, there has been considerable testimony put into this case as to the good character of this young man. Every man who comes before you to be tried is presumed to have a good character, without any evidence whatever in the case; and it is for you to say how much that presumption of good character has been strengthened, if strengthened at all, by some nine or ten witnesses who have been put upon the stand before you. Evidence of good character is, in some cases, an important factor;—that is, that which amounts to evidence of good character. If a man residing in a community has always borne the reputation of being a good man, and good, respectable citizens come in and swear that he has always held a good character, and when, in regard to the offense charged, there seems to be an even, or nearly an even, conflict as to whether he is, or whether he is not, guilty, then that good character, put into the balance, ought to have a great deal of weight in such a case. Oftentimes it would be conclusive." This charge was erroneous and misleading. Proof of good character is to have greater weight than suggested by this charge. It is applicable in all cases where crime is charged. It is not to be limited to cases where there is an even conflict as to whether the respondent is or is not guilty. As was said by this court, in *People v. Jassino* (Mich.) 59 N. W. 230: "Evidence of good character is admissible, not only in a case where doubt otherwise exists, but may be offered for the purpose

¹ The statute provides that any person who breaks and enters in the night any office, shop, or store "not adjoining to or occupied with a dwelling house," with intent to commit larceny or any felony, shall be imprisoned in the state prison for not more than fifteen years.

of creating a doubt." *People v. Laird* (Mich.) 60 N. W. 457; *People v. Garbutt*, 17 Mich. 9; *Hamilton v. People*, 29 Mich. 195. The conviction must be set aside, and a new trial granted. The other justices concurred.

Supreme Court of Michigan.

(Filed December 17, 1895.)

PEOPLE v. BENNETT.

1. CRIMINAL LAW—COMPLAINT.

A written complaint in a prosecution before a justice of the peace is unnecessary.

2. SAME—WARRANT—LOCAL OPTION LAW.

A warrant for the violation of the local option law (act No. 207 of 1889), issued by a justice of the peace, need not recite the evidence showing that such law was in force in the county, nor set forth the evidence showing that defendant was not a druggist, and therefore within the exception of the statute.

3. SAME—HIRED WITNESS.

Where the defendant's arrest is the outgrowth of a purchase by the complainant with that object in view, it is unnecessary for the court to do more than inform the jury that such facts, if proved, are to be considered in determining the credit due to his testimony.

4. SAME—INSTRUCTION—WAIVER.

Where the reading of the record of the board of supervisors has been waived by defendant, he cannot complain on appeal from conviction under act No. 207 of 1889, of instruction that the local option law was in force in that county.

Appeal from a judgment convicting defendant under the local option law.

Guy M. Chester, Pros. Atty., for the people.

Timothy E. Dibell, for defendant.

HOOKER, J.—The defendant appeals from a conviction under the local option law. A motion was made before the justice to

quash the proceedings for want of jurisdiction, and it was renewed in the circuit. It is based upon many alleged defects, but reliance appears to be placed more especially upon the claim that the complaint and warrant do not state an offense, and that the justice did not have certain evidence before him, previous to the issue of the warrant. The essential evidence said to have been wanting is: (1) Evidence that the local option law was in force in Hillsdale county at the time of the alleged offense; (2) competent evidence that the defendant was not a druggist or pharmacist, and therefore within the exception to the law. A written complaint was taken, though it was unnecessary. *People v. Berry* (filed at the present term) 65 N. W. 98. If it was insufficient, it is no worse than no written complaint, unless it precludes the inference that a valid oral complaint was made. Ordinarily, where no formal written complaint is taken, the complaint amounts to little, if any, more than information to the justice that, in the opinion of the party complaining, an offense has been committed, taken in conjunction with his subsequent statements made upon oath in relation to the details thereof. We may reasonably suppose that such complaint is rarely so complete as to contain all of the statements necessary to prove an offense. It may be that the witness has not knowledge of all, and that his testimony must be supplemented by that of others, to cover all of the points that should be shown to justify the issue of the warrant. This may be supplied by an examination of the complainant and others upon oath. We may therefore dismiss the complaint with remark that it was unnecessary, without taking the trouble to inquire as to its formal sufficiency were a written complaint required.

The warrant recites the fact of the making of complaint in writing, and the examination on oath of the complainant. It is attacked — First, as not stating an offense; second, as showing affirmatively that it was improvidently issued, because it does not show that the justice had evidence before him that the local option act was in force, and that defendant was not a druggist or registered pharmacist. This warrant charges that the defendant kept a saloon in Jonesville village at a time alleged, where spirituous and intoxicating liquors were sold, stored for sale, given away, and furnished as a beverage. It negatives a possible claim that

they were within the exception of the act as to the purpose for which they were kept and sold. It alleges that the defendant was not a druggist or registered pharmacist within the law, but was a keeper in violation of Act No. 207 of the Laws of 1889, and of a preamble and resolution and order of prohibition adopted by the board of supervisors of Hillsdale county pursuant to said act. It recites the fact that said complaint was made on oath, and in writing, and that the complainant was examined upon oath. The important point made upon the sufficiency of the warrant is that it fails to show that the justice had evidence before him that the local option law was in force. It is urged that it does not show that the complainant testified to it, and that, if it did, it would be no better, because such testimony is not the kind of evidence required, the law providing how the fact shall be proved. The statute does not require that a warrant shall recite the evidence taken, nor does it say that it shall name all witnesses examined, or mention the documentary evidence placed before the magistrate during his investigation, to determine whether an offense has been committed. He takes such evidence as in his judgment bears upon the question; and no case has been cited where the circuit court has inquired whether the evidence was of the highest character, or whether it was admissible at all. Moreover, there is nothing upon this record to show that duly-certified copies of the proceedings were not before the magistrate. They may have been produced by the complainant, or by the prosecuting attorney, if he had anything to do with the case. It was not necessary to load the warrant down with statements of this kind, and we do not agree with the counsel that the record shows that the proper evidence could not have been before the justice. Presumably it was, or he would not have issued his warrant. Again, when we come to the examination, there is nothing upon this record to show that this evidence was not offered, if it is competent, upon a trial or motion to quash, for the circuit court to review the evidence taken by the justice to ascertain whether he had legal evidence of of each material fact, which we need not consider.

What has been said is quite as applicable to the question relating to the failure to allege or show that the defendant was not within the exception of the statute. We cannot say but that there

was direct and positive evidence that the defendant was neither druggist or registered pharmacist, and we are not prepared to say that a justice might not infer the fact from the situation and character of the place where the liquor was sold, and the nature of the transaction.

The defendant's arrest is said to have been the outgrowth of a purchase by the complainant with that object in view, and requests to charge were based upon that fact, which the court did not give; but we think that he covered the subject. It was perhaps proper for the counsel to argue to the jury that the complainant was a "hired witness" and "a spy," and that "he was willing to go and did ask the defendant to violate the law for the sole and express purpose of making a case and instituting a criminal prosecution against him"; but it was unnecessary for the court to do more than to inform the jury that such facts, if proved, were to be considered in determining the credit due to his testimony. Similar instructions in favor of the prosecution and against the defendant, had the facts been reversed, would have been distasteful to counsel, and erroneous, if the facts were open to question.

The record of the board of supervisors was produced and received in evidence. The reading was waived by counsel. He now insists that it was error to instruct the jury that act No. 207 was in force in the county. As defendant has not seen fit to print this evidence, we cannot tell whether the court erred in this instruction or not. Presumably he read this evidence, and decided that it was sufficient proof. It was for the court to determine that question, and for the jury to follow his direction in regard to it. Hence it was immaterial whether the proceedings were read audibly in the presence of the jury or not. We think there is no occasion to discuss the case further. We think no error, and the judgment will be affirmed. The other justices concurred.

Supreme Court of Michigan.

(Filed December 17, 1895.)

PEOPLE v. COX.

1. CRIMINAL LAW—FORMER ADJUDICATION—BAR.

A person cannot be punished for the same transgression under section 1997a and section 9286 of 3 How. Ann. St.

2. SAME.

A prosecution on a charge laid at a date anterior to the former indictment is barred by a conviction upon such former indictment, where the offense charged is a continuing one.

Appeal from a judgment convicting defendant of keeping a house of ill fame.

Joseph M. Hambitzer, for appellant.

A. T. Streeter, Pros. Atty., for the People.

HOOKER, J.—Section 1997a, 3 How. Ann. St., declares that “all keepers of bawdy houses, or houses for the resort of prostitutes, shall be deemed disorderly persons;” and by the succeeding section the first offense is made punishable by a fine of \$50 and cost of prosecution, or by imprisonment in the county jail or Detroit house of correction not exceeding thirty days, or the person convicted may be required to give sureties for good behavior for the period of three months. Section 9286, id., provides that “every person who shall keep a house of ill-fame, resorted to for the purposes of prostitution or lewdness, and every person who shall solicit, or in any manner induce a female to enter such house for the purpose of becoming a prostitute, or shall by force, fraud, or deceit, or in any like manner procure a female to enter such house for the purpose of prostitution, shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment in the state prison not more than five years, or in the county jail not more than one year, or by fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the

discretion of the court." The defendant appeals from a conviction under the latter section, upon an information which charges that "heretofore, to wit, on the 1st day of December, A. D. 1894, and on divers other days and times between that day and the 1st day of January, 1895, * * * he unlawfully and feloniously did keep and maintain a certain house of ill-fame, resorted to for the purpose of prostitution and lewdness." To this information a plea of former conviction was interposed, setting forth the warrant upon which said conviction was had, and stating that in that proceeding he was prosecuted for keeping the same house, and that it was a continuation of the same offense for which he is now prosecuted. The warrant mentioned shows that he was proceeded against as a disorderly person, under the section first mentioned, the charge being "that heretofore, to wit, on the 23d day of March, A. D. 1895, and for ten days preceding that day, at the township of Duncan, in said county, Ira Cox, of said township of Duncan, has been and is a disorderly person, within the meaning of section 1 of act No. 264 of the Public Acts of Michigan of 1889, being section 1997a of Howell's Annotated Statutes of the State of Michigan, for that the said Ira Cox, at the township of Duncan, in said county, during and at times aforesaid, was the keeper of a house for the resort of prostitutes." It will be noticed that the present prosecution is for an alleged offense anterior to that upon which he was first convicted. Two questions are presented for our consideration: (1) Whether a continuous keeping of a house of ill-fame, resorted to for the purpose of prostitution, etc., is a continuing offense, so that a conviction bars another prosecution for such keeping previous to the time of the indictment upon which a conviction has been had. (2) If so, whether a conviction, under the disorderly act of keeping a house for the resort of prostitutes, bars a prosecution for keeping a house of ill-fame, resorted to for the purposes of prostitution, at a time previous to the first indictment.

To establish guilt under the disorderly act, it is necessary to show that the house is kept for the resort of prostitutes. Under the other act, the house must be resorted to for purposes of prostitution and lewdness by men or women, or both, and it must be a house of ill-

fame. The first falls short of the second, as it may or may not be a house of ill-fame, and acts of prostitution may or may not be committed there. The act implies that it shall be a rendezvous for prostitutes,—a place which they visit or haunt (see Webst. Dict. "Resort"); and it may be open to question whether the disorderly act would apply to a person who kept a house where prostitutes merely made it their permanent residence. But such a person might be punishable under the other statute, if the house was a house of ill-fame, and was resorted to (i. e., visited) for the purpose of prostitution and lewdness. These acts are made criminal under separate statutes, but they are of the same nature. The act of keeping a disorderly house is the gravamen of the offense in each. A given state of facts may permit an election by the prosecutor as to which of the two offenses he will charge; but in this case, as keeping a disorderly house is a vital incident under both statutes, he should not be permitted to bring successive charges under both acts for one and the same transgression. The lesser offense is necessarily included in the greater, and "as the government cannot begin with the highest, and then go down step by step, bringing the man into jeopardy for every dereliction included therein, neither can it begin with the lowest and ascend to the highest, with precisely the same result." We think, therefore, that one should not be prosecuted under both statutes for one and the same unlawful act.

It remains to inquire whether this doctrine can be applied in this case, in view of the fact that the charge in this case covers time anterior to the charge in the former. Can the continuous keeping of a house under either of these statutes be treated as more than one offense? Technically speaking, when one engages in a business, he cannot be said to engage a second time in the same venture. He may engage in a similar business elsewhere, or upon another occasion, after bringing the first venture to a close. The same may be said about keeping a saloon or brothel. So long as it is uninterrupted, it is really but one act of keeping. To hold otherwise at once raises the question of duration of the offense. Shall the same be measured by years, months, weeks, days, hours, or by still shorter intervals? On the other hand, is there no difference between the offender of a day, and one whose

business has run for a year? And, further, after one has incurred and suffered one conviction, may he continue the unlawful act *ad libitum*, safe from further prosecution, by reason of the former conviction? The injustice of dividing a continuous act into as many offenses as there are days in the period of its continuation was early seen and asserted. The principle was applied in a case where four charges were made of infractions of the law upon one and the same day, in the case of *Crepps v. Durden*, Cowp. 640. That case arose under a statute prohibiting labor upon the Lord's day, and it was held that a conviction upon proof that a baker sold a hot loaf upon that day was a bar to prosecutions for selling other loaves upon the same day, the court saying that: "There is no idea conveyed by the act itself that, if a tailor sews on the Lord's day, every stitch is a separate offense. * * * There can be but one offense on one and the same day." In *re Snow*, 120 U. S. 282; 7 Sup. Ct. 556, involved the question before us; and it was held that the offense of illegal cohabitation as husband and wife was a "continuous offense, having duration, and not an offense consisting of an isolated act." The court refused to permit more than one conviction for such act, and called attention to the great injustice of cumulative penalties, which would be possible under the practice insisted upon by the prosecutor, and said, "It is to prevent such an application of the penal laws that the rule has obtained that a continuing offense of the character of the one in this case can be committed but once, for the purposes of indictment or prosecution, prior to the time the prosecution is instituted." Again it is said, alluding to such cumulative sentences: "No case has been cited where what has been done in the present case has been held lawful. But the uniform current of authority is to the contrary, both in England and in the United States;" citing the case of *Crepps v. Durden*, *supra*. A number of the American cases are cited in the opinion, which it is unnecessary to repeat here. See, also, *Com. v. Robinson*, 126 Mass. 259, which is thought to be in harmony with the rule laid down in the case of *Snow*. In *re Neilson*, 131 U. S. 176; 9 Sup. Ct. 672, is another case in point, and is decisive of both questions in the case. The case of *People v. Gault* (Mich.) 62 N. W. 724, is distinguishable from this case, as it arose under a statute which provided that the

transactions of each day should be a separate offense. It is, in our opinion, well settled that a prosecution upon a charge laid at a date anterior to a former indictment is, in such a case as this, barred by a conviction upon such former indictment; where the offense charged is a continuing one. The defendant therefore had the right to go to the jury upon the question of fact raised by the plea at bar, and the conviction must therefore be set aside, and the respondent discharged. See *People v. Jones*, 48 Mich. 554; 12 N. W. 848.

Ordered accordingly. The other justices concurred.

Supreme Court of Michigan.

(Filed December 17, 1895.)

PEOPLE v. GAY.

CONSTITUTIONAL LAW—UNLAWFUL DISCRIMINATION.

Act No. 74 of 1893, is not in conflict with the section of the United States Constitution prohibiting a state from discriminating against the citizens of other states.

Appeal from a judgment convicting defendant of violating the act prohibiting the soliciting of insurance for a nonresident without a certificate of authority from the insurance commissioner.

Frank E. Knappen and Myron H. Beach, for appellant.

Alfred S. Frost, Pros. Atty. (E. M. Irish, of counsel), for the People.

MONTGOMERY, J.—By Act No. 74 of the Session Laws of 1893, it was enacted that it shall be unlawful for any person or persons, as agent, solicitor, surveyor, broker, or in any other capacity to transact, or to aid in any manner, directly or indirectly, in the transacting or soliciting within this state any insurance business for any person, persons, firm, or copartnership who are non-

residents of this state, or for any fire or inland navigation insurance company or association not incorporated by the laws of this state, or acting for or in behalf of any person or persons, firm or copartnership, as agent or broker, or in other capacity, or procure or assist to procure a fire or inland marine policy or policies of insurance on property situated in this state, for any nonresident person, persons, firm or copartnership, or for any company or association, without this state, whether incorporated or not, without the procuring or receiving from the commissioner of insurance the certificate of authority provided for in section 23 of an act entitled "An act relative to the organization of fire and marine insurance companies transacting business within this state," approved April 3, 1889, as amended. Such certificate of authority shall state the name or names of the person, persons, firm or copartnership, or the location of the company or association as the case may be, showing the party named in the certificate has complied with the laws of this state regulating fire and inland insurance, and the name of the duly-appointed attorney in this state on whom process may be served. By section 5 of the act of which the above is amendatory. It is provided: "In any suit brought under this act it shall not be necessary to prove the legal incorporation or association of any corporation or association of individuals, the policies of which have been solicited or issued contrary to this act. It shall be sufficient to show that the policy of insurance has been solicited or issued, directly or indirectly, by or through the defendant company or association, not authorized to do business in this state."

Respondent was charged and convicted in the Kalamazoo circuit court of a violation of this act. He has brought the record here for review on exceptions before sentence. While the record contains numerous assignments of error, we have not been favored with any brief on behalf of the respondent. We have, however, looked through the record, and discovered no error. The only question meriting discussion is whether the law in question is unconstitutional. It appears from the defendant's requests that it was contended below that the statute contained an unwarranted discrimination against the citizens of other states. It has been repeatedly held that it is within the power of the state to exclude

corporations of other states from doing business in this state, except on such terms as the legislature may see fit to prescribe for the protection of its citizens. *Insurance Co. v. Raymond*, 70 Mich. 485; 38 N. W. 474; *Doyle v. Insurance Co.*, 94 U. S. 535. This naturally carries with the right to prohibit individuals within this state from acting for such inhibited corporations. *People v. Howard*, 50 Mich. 239; 15 N. W. 101; *Paul v. Virginia*, 8 Wall. 168. But it appears to have been insisted below that, while it may be competent to prohibit corporations from doing business within this state, the legislature cannot deny the right to individuals. But an answer to this is that there is no discrimination against individuals of other states under the insurance laws of this state. See *State v. Ackerman*, 51 Ohio St. 163; 37 N. E. 828; *State v. Stone* (Mo. Supp.) 24 S. W. 164. Conviction affirmed, and the court is instructed to proceed to sentence. The other justices concurred.

United States Supreme Court.

(Filed December 23, 1895)

MOORE v. UNITED STATES.

1. INDICTMENT—EMBEZZLEMENT.

Where the words charging defendant with being a postoffice employe are material in an indictment which charges, under Act March 3, 1875, the embezzlement of a certain sum of money, belonging to the United States, by defendant, it must be averred that the money embezzled came into his hands by virtue of such employment.

2. SAME.

If the words of such indictment charging defendant's employment, are treated as surplusage, the property embezzled must be identified with particularity.

In error to the district court of the United States for the southern district of Alabama.

Plaintiff in error, late assistant postmaster of the city of Mobile, was indicted and convicted of embezzling certain moneys of the United States, to the amount of \$1,652.59.

There were four counts in the indictment, to one of which a demurrer was sustained, and upon two others defendants was acquitted. The fourth count, upon which he was convicted, charged that "the said George S. Moore, being then and there an assistant, clerk, or employe in or connected with the business or operations of the United States post office in the city of Mobile, in the state of Alabama, did embezzle the sum of sixteen hundred and fifty-two and 59-100 dollars (\$1,652.59), money of the United States, of the value of sixteen hundred and fifty-two and 59-100 dollars (\$1,652.59), the said money being the personal property of the United States."

Moore, having been sentenced to imprisonment at hard labor, sued out this writ of error.

M. D. Wickersham and W. H. McIntosh, for plaintiff in error.

Asst. Atty. Gen. Whitney, for the United States.

Mr. Justice BROWN delivered the opinion to the court.

Defendant was indicted under the first section of the act of March 3, 1875, "to punish certain larcencies, and the receivers of stolen goods." (18 St. 479), which enacts "that any person who shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be deemed guilty of felony," etc.

The principal assignment of error is to the action of the court in overruling a demurrer to the fourth count of the indictment, which charges, in the words of the statute, that "the said George S. Moore, being then and there an assistant, clerk, or employe in or connected with the business or operations of the United States post office in the city of Mobile, in the state of Alabama, did embezzle the sum of ———, money of the United States, of the value of ———, the said money being the personal property of the United States."

Embezzlement is the fraudulent appropriation of property by a person to whom such property has been intrusted, or into whose hands it has lawfully come. It differs from larceny in the fact that the original taking of the property was lawful, or with the consent of the owner, while in larceny the felonious intent must have existed at the time of the taking.

It is objected to the indictment in this case that there is no direct allegation that defendant was an assistant, clerk, or employe in or connected with the business or operations of the post office at Mobile, that the money of the United States is not identified or described; and that there is no allegation that it came into the possession of the defendant by virtue of his employment.

The act in question has never been interpreted by this court, nor has our attention been called to any case where it has received a construction in this particular, except that of *McCann v. U. S.*, 2 Wyo. 274, decided in the territorial supreme court of Wyoming, in which the allegation was that "McCann * * * at and within the district aforesaid, twenty thousand pounds of sugar * * * of the goods, chattels, and property of the United States of America, then and there being found, then and there feloniously and fraudulently did embezzle, steal, and purloin," etc. This allegation was held to be defective in charging a mere legal conclusion, "leaving it impossible to determine whether the offense was committed, and the conclusion correct." It was said that the indictment for this offense must set forth the actual fiduciary relation and its breach; that the indictment did not identify the offense on the record, and did not secure the accused in his right to plead at former acquittal or conviction to a second prosecution for the offense. It was held that the words "to embezzle" were equivalent to the words "to commit embezzlement," and that a count in the words of the statute was not sufficient; that "all the ingredients of fact that are elemental to the definition must be alleged, so as to bring the defendant precisely and clearly within the statute. If that can be done by simply following the words of the statute, that will do; if not, other allegations must be used." The general principle here alluded to has been applied by this court in several cases. *U. S. v. Carll*, 105 U. S. 611; *U. S. v. Cooke*, 17 Wall. 168; *U. S. v. Cruikshank*, 92 U. S. 542.

In the case of *U. S. v. Northway*, 120 U. S. 328; 7 Sup. Ct. 580, the word "embezzle" was recognized as having a settled, technical meaning of its own, like the words "steal, take and carry away," as used to define the offense of larceny. In this case the allegation was that the defendant, "as such president and agent" (of a national bank), "then and there had and received in and into his possession certain of moneys and funds of said banking association, * * * and then and there, being in possession of the said" defendant, "as such president and agent aforesaid, he, the said" defendant, "then and there * * * wrongly, unlawfully, and with intent to injure and defraud said banking association, did embezzle and convert to his * * * own use." In respect to this, it was said to be quite clear that the allegation was sufficient, as it distinctly alleged that the moneys and funds charged to have been embezzled were at the time in the possession of the defendant as president and agent. "This necessarily means," said the court "that they had come into his possession in his official character, so that he held them in trust for the use and benefits of the association. In respect to those funds, the charge against him is that he embezzled them by converting them to his own use. This we think fully and accurately describes the offense of embezzlement under the act by an officer and agent of the association."

In the case of *Claassen v. U. S.*, 142 U. S. 140; 12 Sup. Ct. 169, an allegation similar in substance and effect was also held to be sufficient. The indictment, said the court, "avers that the defendant was president of a national banking association; that by virtue of his office he received and took into his possession certain bonds (fully described), the property of the association; and that with intent to injure and defraud the association, he embezzled the bonds and converted them to his own use. On principle and precedent, no further averment was requisite to a complete and sufficient description of the crime charged."

The cases reported from the English courts and from the courts of the several states have usually arisen under statutes limiting the offense to certain officers, clerks, agents, or servants of individuals or corporations; and the rulings that the agency of fiduciary

relation must be averred, as well as the fact that the money embezzled had come into the possession of the prisoner in that capacity, are not wholly applicable to a statute which extends to every person regardless of his employment, or of the fact that the money had come into his possession by virtue of any office or fiduciary relation he happened to occupy. These cases undoubtedly hold, with great uniformity, that the relationship must be averred in the exact terms of the statute, that the property embezzled must be identified with great particularity, and that it must also be averred to have come into the possession of the prisoner by virtue of his fiduciary relation to the owner of the property.

Thus, in *Com. v. Smart*, 6 Gray, 15, it was held that an indictment which averred that the defendant "was intrusted" by the owner "with certain property, the same being the subject of larceny" (describing it), "and to deliver the same to" the owner "on demand," and afterwards "refused to deliver said property to said" owner, "and feloniously did embezzle and fraudulently convert to his own use, the same then and there being demanded of him by said" owner, was fatally defective, by reason of omitting to state the purpose for which the defendant was intrusted with the property, or what property he fraudulently converted to his own use. So in *People v. Allen*, 5 Denio, 76, under a statute limiting the offense to clerk and servants, it was held that a count charging the defendant with having collected and received certain money as the "agent" of an individual was defective.

On the other hand, in *Lowenthal v. State*, 32 Ala. 589, an indictment charging, in the form prescribed by the Code, that the defendant, being agent or clerk of another, "embezzled, or fraudulently converted to his own use, money to about the amount of eighteen hundred dollars (\$1,800), * * * which came into his possession by virtue of his employment," was sufficient. See, also, *People v. Tomlinson*, 66 Cal. 344; 5 Pac. 509; *Com. v. Hussey*, 111 Mass. 432. It was held, however, in *State v. Stimson*, 23 N. J. Law, 9, that it was not sufficient to describe the offense in the words of the statute, and that there should be some description either of the number or denomination of the coins and of the notes, and also an averment of the value of the notes.

Indeed, the rulings in this class of cases became in some in-

stances so strict that the statutes were passed in several of the states defining what should be necessary and sufficient in indictments for embezzlement. Thus, in the Criminal Code of Illinois, it is declared to be sufficient to allege, generally, in the indictment, an embezzlement, fraudulent conversion, or taking, with intent to embezzle and convert funds of any person, bank, corporation, company, or co-partnership, to a certain value or amount, without specifying any particulars of such embezzlement. Under this statute, it was held proper for the court to permit all the evidence of what the defendant did by reason of his confidential relations with the banking firm, whose clerk he was, to go to the jury, and if the jury found, from the whole evidence, any funds or credits for money had been embezzled or fraudulently converted to his own use by the defendant, it was sufficient to maintain the charge of embezzlement. "The view taken by the defense," said the court, "of this statute, is too narrow and technical to be adopted. It has a broader meaning, and, when correctly read, it will embrace all wrongful conduct by confidential clerks, agents, or servants, and leave no opportunity for escape from just punishment on mere technical objections not affecting the guilt or innocence of the party accused." *Ker v. People*, 110 Ill. 627, 647.

The ordinary form of an indictment for larceny is that J. S., late of, etc., at, etc., in the county aforesaid (specifying the property), of the goods and chattels of one J. N., "feloniously did steal, take, and carry away." In other words, the whole gist of the indictment lies in the allegation that the defendant stole, took, and carried away certain specified goods belonging to the person named. The indictment under consideration is founded upon a statute to punish larcencies of government property. It applies to "any person," and uses the words "embezzle, steal, or purloin" in the same connection, and as applicable to the same persons and to the same property. There can be no doubt that a count charging the prisoner with stealing or purloining certain described goods, the property of the United States, would be sufficient without further specification of the offense; but whether an indictment charging in such general terms that the prisoner "embezzled" the property of the government (identifying it) would be sufficient, we do not undertake to determine, although we think the

rules of good pleading would suggest, even if they did not absolutely require, that the indictment should set forth the manner or capacity in which the defendant became possessed of the property.

For another reason, however, we think the indictment in this case is insufficient. If the words charging the defendant with being an employe of the post office be material, then it is clear, under the cases above cited, that it should be averred that the money embezzled came into his possession by virtue of such employment. Unless this be so, the allegation of employment is meaningless, and might even be misleading, since the defendant might be held for property received in a wholly different capacity,—such, for instance, as a simple bailee of the government. In the absence of a statutory regulation, the authorities upon this subject are practically uniform. *Whart. Cr. Law*, § 1942; *Rex v. Snowley*, 4 Car. & P. 390; *Com. v. Simpson*, 9 Metc. (Mass.) 138; *People v. Sherman*, 10 Wend. 298; *Rex v. Prince*, 2 Car. & P. 517; *Rex v. Thorley*, 1 Moody, Cr. Cas. 343; *Bakewell's Case*, Russ. & R. 35.

On the other hand, if these words be rejected as surplusage and mere *descriptio personæ*, then the property embezzled should be identified with particularity; the general rule, in the absence of a statute, being that an averment of the embezzlement of a certain amount in dollars and cents is insufficient. *Rex v. Furneaux*, Russ. & R. 336; *King v. Fowler*, 5 Car. & P. 736; *Com. v. Sawtelle*, 11 Cush. 142; *People v. Bogart*, 36 Cal. 245; *People v. Cox*, 40 id. 275; *Barton v. State*, 29 Ark. 68; *State v. Thompson*, 42 id. 517; *State v. Ward*, 48 id. 36; 2 S. W. 191.

There are undoubtedly cases which hold that, where the crime consists, not in the embezzlement of a single definite quantity of coin or bills, but in a failure to account for a number of small sums received,—a series of petty and continuous peculations,—where it would be manifestly impossible, probably for the defendant himself, but much more for the prosecution, to tell of what the money embezzled consisted, an allegation of a particular amount is sufficient. These cases, however, are confined to public officers, or to the officers of corporations; and where the embezzlement consists of a single amount of property, the general rule above stated still holds good. The leading case upon this

point is that of *People v. McKinney*, 10 Mich. 54, 89. In this case the treasurer of the state of Michigan was charged with the embezzlement of \$4,000 belonging to the state. It was held that as the treasurer had by law the entire custody and management of the public money, with authority to receive such descriptions of funds as he chose, the public could exercise no control or constant supervision over him, and that it would be wholly impracticable to trace or identify the particular pieces of money or bills received by him, and hence that the allegation of a certain amount was sufficient. This case has been followed by several others, and may be said to apply to all instances where it would be impracticable to set forth or identify the particular character of the property embezzled. *State v. Munch*, 22 Minn. 67; *State v. Ring*, 29 id. 78; 11 N. E. 233; *State v. Smith*, 13 Kan. 274, 294; *State v. Carrick*, 16 Nev. 120; *U. S. v. Bornemann*, 36 Fed. 257. In some jurisdictions, however, notably in England, California, Louisiana, and Massachusetts, the difficulty has been entirely remedied by statute. *Greaves*, Cr. Law, 156; *Rex v. Grove*, 1 Moody, Cr. Cas. 447; *Com. v. Butterick*, 100 Mass. 1; *Com. v. Bennett*, 118 id. 443; *People v. Treadwell*, 69 Cal. 226; 10 Pac. 502; *State v. Thompson*, 32 La. Ann. 796.

If, then, the indictment in this case had charged that the defendant, being then and there assistant, clerk, or employe in or connected with the business or operations of the United States post office in the city of Mobile, embezzled the sum stated, and had further alleged that such sum came in his possession in that capacity, we should have held the indictment sufficient, notwithstanding the general description of the property embezzled as consisting of so many dollars and cents. But, if the words charging him with being in the employ of the government be stricken out, then there would be nothing left to show why the property embezzled could not be identified with particularity, and the general rule above cited would apply. The indictment would then reduce itself to a simple allegation that the said George S. Moore, at a certain time and place, did embezzle the sum of \$1,652.59, money of the United States, of the value, etc., said money being the personal property of the United States, which generality of description would be clearly bad. As there

was a demurrer to this count, which was overruled, we do not think the objection is covered by Rev. St. § 1025, or cured by the verdict.

As we hold the indictment in this case to be bad, we find it unnecessary to consider the other errors assigned.

The judgment of the court below is therefore reversed, and the case remanded, with directions to quash the indictment.

United States Supreme Court.

(Filed December 16, 1895.).

WHITEN v. TOMLINSON.

1. HABEAS CORPUS—STATE COURT.

Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of the trial in the court in which he is indicted; but that discretion is to be subordinated to any special circumstances requiring immediate action.

2. SAME.

Except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner the usual and orderly course of proceeding by writ of error from the Federal supreme court.

3. SAME—PETITION.

In a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence.

4. SAME.

The general allegations in the petition that the petitioner is detained in violation of the Constitution and Laws of the United States and of the Constitution and Laws of one of the states, and is held without due process of law, are averments of mere conclusions of law, and not of matters of fact.

5. SAME.

An allegation in the petition that in August and September, 1893, the petitioner was tried before a local court in New Haven upon the same charge, and, upon a full hearing, was discharged by the court, affords no ground for his discharge on habeas corpus.

6. SAME.

The fact that an indictment, actually presented by the grand jury of the court lacked the words "A true bill," and was found by the grand jury by mistake and misconception, is a proper subject of inquiry in the courts of the state, but affords no ground for interposition by the courts of the United States by writ of habeas corpus.

7. SAME—RECORD.

A letter written by the judge to petitioner's counsel in regard to an amendment of the record has no place in the record, and its insertion therein does not show such amendment.

8. SAME—EXTRADITION.

A warrant of extradition of the governor of a state, issued upon the requisition of a governor of another state, accompanied by a copy of an indictment, is *prima facie* evidence that the accused had been indicted, and was a fugitive from justice, and, if the court in which the indictment was found had jurisdiction of the offense, is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted to be inquired into and to determine, in the first instance, by the courts of the state.

9. SAME—RETURN OF SHERIFF.

Any defect in the return of the sheriff to the writ of habeas corpus in not setting forth the indictment and the warrant of extradition, as ground for the detention of the prisoner, affords no reason why the courts of the United States should take the prisoner out of the custody of the authorities of the State.

10. SAME—RESIDENCE.

The question whether the word "resides," as used in section 962 of Com. St. implies domicile or only presence in the county, is for the decision of the state court.

11. SAME—RECOGNIZANCE.

The question whether a recognizance, entered into for one's appearance in the state court on the day appointed by law for the beginning of the court term, requires his appearance on the subsequent day of the term, is a question for the state court, rather than for the federal court upon a petition by writ for habeas corpus.

Appeal from the circuit court of the United States for the district of Connecticut.

This was a petition, filed March 25, 1895, in the circuit court of the United States for the district of Connecticut, and addressed

to the Honorable William K. Townsend, the district judge, as a judge of the circuit court, for a writ of habeas corpus to the sheriff of the county of New Haven, in the state of Connecticut. The petition was signed by the petitioner, and verified by his oath, and was as follows :

"The petition of George E. Whitten respectfully shows to your honor that he is now a prisoner confined in the custody of Charles A. Tomlinson, sheriff of the county of New Haven, in the county jail in the city of New Haven, in said county, for a supposed criminal offense, to wit, a crime of murder in the second degree.

"Your petitioner also shows that such confinement is by virtue of a warrant, a copy whereof is in the possession of said sheriff; and your petitioner avers that, to the best of his knowledge, he is not committed or detained by virtue of any process of law known to the courts of the United States or the several states, but he is now detained in violation of the Constitution of the United States, in violation of the laws of the United States, and in violation of the Constitution and laws of the state of Connecticut; and that he is not held in confinement by virtue of any final judgment or decree of any competent court or tribunal of criminal jurisdiction, or by virtue of any process issued upon such judgment or decree, but is held without due process of law.

"And your petitioner further says that at the time of his arrest, and for a long time prior thereto, he was a citizen of Massachusetts, and was extradited from Massachusetts for said alleged crime in January, 1895; and he says that he is advised by his counsel, William H. Baker, residing at Boston, and so believes, that his said imprisonment is illegal, and that said illegality consisted in this, to wit :

That in August and September, 1893, this petitioner was tried before the local court sitting within and for the county of New Haven, state of Connecticut, upon a charge of murder in the second degree, being the same alleged charge for which he was extradited, and was after a full hearing thereof discharged from said court.

"That thereafterwards this petitioner remained in the city of New Haven, state of Connecticut, for a long time,—during at least two sessions of the grand jury,—and then removed to New-

ton, in the cammonwealth of Massachusetts, some time early in the year 1894.

"That he was in January, 1895, while such citizen of Massachusetts, arrested and extradited from the state of Massachusetts upon a warrant issued by the governor of Massachusetts on demand and application of the governor of Connecticut, alleging that an indictment had been found by the grand jury against him of murder within and for the county of New Haven, being the same charge on which he was tried as above. This petitioner was taken to the said city of New Haven by virtue thereof.

"This petitioner avers that no indictment was ever found against him by any grand jury sitting at any time within the state of Connecticut, nor no indictment as and for a true bill ever was presented by any grand jury in said state of Connecticut against him, which he is ready to verify and prove; and any pretended indictment was found by mistake or misconception and was not their true verdict or finding.

"Further, your petitioner says that he was not, at the time of this extradition as aforesaid, as a fugitive from justice from said state of Connecticut.

"Wherefore yours petitioner prays a writ of habeas corpus, to the end that he may be discharged from custody, and be allowed to depart safely from out the state of Connecticut to the commonwealth of Massachusetts, without interference in any way by the state authorities of the state of Connecticut, without reference to said charge made against him."

On March 27th a writ of habeas corpus was issued accordingly by the district judge, returnable forthwith at a special term of the circuit court.

On March 28th the sheriff made his return to the writ, stating, as the cause of the petitioner's detention and imprisonment, that he was committed to the jail by virtue of the following mittimus:

"To the Sheriff of New Haven County, His Deputy, or Any Proper Officer or Indifferent Person, Greeting:

"Whereas Lucius B. Hinman, of New Haven, Conn., did on the 17th day of January, 1895, enter into a recognizance in the sum of five thousand dollars for the appearance of George E.

Whitten, of the town of Newton, state of Massachusetts, before the superior court to be holden at New Haven, within and for the county of New Haven, on the first Tuesday of January, 1895, and the said Lucius B. Hinman now believes that said George E. Whitten intends to abscond, and having produced the evidence that he is surety as aforesaid for the said George E. Whitten, and hath applied to me for a mittimus, and hath made oath before me that the statements in his said application are true:

"These are, therefore, by authority of the state of Connecticut, to command you that you forthwith arrest the said George E. Whitten, and him commit to the jail of said New Haven county; and the keeper of said jail is hereby ordered to receive the said George E. Whitten, and him safely keep within said jail, until he be discharged by due order of law. Hereof fail not, but due service and return make.

"Dated at New Haven, this 26th day of March, A. D. 1895.

"JOHN S. FOWLER,

"Justice of the Peace."

The petitioner moved to quash the return, as insufficient to justify his detention.

To the circuit court, upon a hearing, denied the motion, and discharged the writ of habeas corpus, without prejudice to the right of the petitioner to renew the motion; and filed an opinion by the district judge (67 Fed. 230), in which the grounds of decision were stated as follows:

"The writ was issued; and the sheriff brought the petitioner into this court, and made return as to the cause of his detention and imprisonment, that he was committed to jail by virtue of a mittimus in the form provided for by statute, duly issued by a justice of the peace on the application of the bondman, upon oath that the petitioner intended to abscond. A hearing was had upon a motion to quash the return."

"The petitioner was arrested in Massachusetts, and brought into this state, under a warrant issued by the governor of Massachusetts upon the requisition of the governor of Connecticut, accompanied by a certified copy of the indictment charging the crime, and an affidavit that the petitioner was a fugitive from justice.

"It is claimed, in support of the petition, that the indictment was procured by mistake, and that the prisoner was not in fact a fugitive from justice. These claim are denied by the attorney for the state. In view of the conclusions reached, it is not necessary to pass upon these questions of fact. It may be assumed, in the disposition of this motion, that all the allegations in the petition are true.

"Counsel for the petitioner claims that he can prove in the first place, that the indictment is invalid or void, by reason of some mistake on the part of the grand jury. But the effect of inquiry into this question, assuming such evidence to be admissible and true, would be to call upon the federal court to examine into the proceedings under which said indictment was obtained, and to determine collaterally its sufficiency under the laws of this state."

"It is further claimed that the petitioner was not a fugitive from justice, and that, inasmuch as extradition proceedings are based upon the statutes of the United States, the question whether he was in fact such fugitive is a federal question, which it is the duty of this court to decide. But it is not denied that the demand made upon the executive authority of the asylum state, and his action thereon were proper in form; and it will not be assumed in advance that he has surrendered the petitioner upon insufficient evidence."

"I do not mean to be understood as denying the right to this prisoner, at an appropriate time, to introduce evidence that he was not a fugitive from justice, or that evidence before the governor of Massachusetts was insufficient to authorize his action; nor do I intend at this time to pass upon the merits of this or any other questions presented, nor to intimate what disposition might be made of these claims in case they were brought before this court after final action in the state court. All that is now decided is that it must be assumed in advance that the petitioner may obtain all the protection to which he may be entitled in the courts of this state."

"In view of the principle of right and law underlying the forbearance which the federal and state courts exercise towards each other in order to avoid conflict, I should not be justified in passing upon such questions in advance of the proceedings in the state courts."

On April 25th the petitioner filed in the circuit court an appeal reciting the petition, the return, and the motion to quash the return, and concluding as follows:

"The said circuit court of the United States for the district of Connecticut, on the 28th day of March, 1895, made final ruling, and decreed that upon the face of the petition, without hearing any evidence to sustain the petition [and denying the petitioner the right to introduce any evidence to sustain said petition or tending to sustain it, which the plaintiff duly offered], the writ should be discharged, and that the motion to quash said return be denied, and it was afterwards so decreed and ordered.

"Wherefore this petitioner appeals from the whole of said decree of said circuit court, and the petition, return, motion to quash decree, writ, and all other papers forming a record of said cause may be sent to the supreme court of the United States without delay, together with this appeal, and moves that the said supreme court will proceed to hear the said cause anew, and that the said decree of the said circuit court be reversed, and for such further order and decree to be made as will to the supreme court of the United States seem just and right. The petition for the writ of habeas corpus, the writ of habeas corpus, the return of the sheriff, the motion to quash, and the decree of the court are hereby made a part of this appeal."

On the same day that appeal was allowed by the district judge.

On May 8th the petitioner filed a paper, purporting to amend his appeal by inserting the words above printed in brackets, and with this paper filed the following letter, addressed to his counsel by the district judge:

"United States Courts, Judges' Chambers, New Haven, May 4, 1895. William H. Baker, Esq., 39 Court street, Boston, Mass.—Dear sir: Continuous court engagements night and day for two days have prevented an earlier reply to your letter of April 29th I had supposed that the record contained a statement of the fact that the court declined to hear the evidence; and if not, I am willing that the statement of said fact should be inserted in the record, provided it can be properly done at this time.

"Yours, trully,

WILLIAM K. TOWNSEND."

The record transmitted to this court set forth the matters above stated; but showed no further order amending the record, or allowing the amendment of the appeal.

William H. Baker, for appellant.

Edward H. Rogers, for appellee.

Mr. Justice GRAY, after stating the case, delivered the opinion of the court.

By the judicial system of the United States, established by congress under the power conferred upon it by the constitution, the jurisdiction of the courts of the several states has not been controlled or interfered with, except so far as necessary to secure the supremacy of the constitution, laws, and treaties of the United States.

With this end, three different methods have been provided by statute for bringing before the courts of the United States proceedings begun in the courts of the states:

First. From the earliest organization of the courts of the United States, final judgments, whether in civil or in criminal cases, rendered by the highest court of a state in which a decision in the case could be had, against a right specially set up or claimed under constitution, laws, or treaties of the United States, may be re-examined and reversed or affirmed by this court on writ of error. Acts Sept. 24, 1789, ch. 20, § 25 (1 Stat. 85); Feb. 5, 1867, ch. 28, § 2 (14 Stat. 396); Rev. St. § 709; *Martin v. Hunter's lessee*, 1 Wheat. 304; *Cohens v. Virginia*, 6 Wheat. 264. Such appellate jurisdiction is expressly limited to cases in which the decision of the state court is against the right of the claimed under the constitution, laws, or treaties of the United States, because, when the decision of that court is in favor of such a right, no revision by this court is necessary to protect the national government in the exercise of its rightful powers. *Gordon v. Caldecleugh*, 3 Cranch, 268; *Montgomery v. Hernandez*, 12 Wheat. 129; *Bank v. Griffith*, 14 Pet. 56, 58; *Missouri v. Andriano*, 138 U. S. 496, 500, 501; 11 Sup. Ct. 385.

Second. By the judiciary act of 1789, the only other way of transferring a case from a state court to a court of the United

States was under section 12, by removal into the circuit court of the United States, before trial, of civil actions against aliens, or between citizens of different states. 1 Stat. 79. Such right of removal for trial has been regulated, and extended to cases arising under the constitution, laws, or treaties of the United States by successive acts of congress, which need not be particularly referred to, inasmuch as the present case is not one of such a removal.

Third. By section 14 of the old judiciary act the courts of the United States were authorized, in general terms, to issue writs of habeas corpus and other writs necessary for the exercise of their respective jurisdictions; "provided that writs of habeas corpus shall in no case extend to prisoners in jail, unless when they are in custody under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81. Under that act, no writ of habeas corpus, except *ad testificandum*, could be issued in a case of a prisoner in jail under commitment by a court or magistrate of a state. *Ex parte Dorr*, 3 How. 103; *In re Burrus*, 136 U. S. 586, 593; 10 Sup. Ct. 850.

By subsequent acts of congress, however, the power of the courts of the United States to issue writs of habeas corpus of prisoners in jail has been extended to the the case of any person in custody for an act done or omitted in pursuance of a law of the United States, or of an order or process of a court or judge thereof, or in custody in violation of Constitution or of a law or treaty of the United States, or who, being a subject or citizen of and domiciled in a foreign state, is in custody for an act done or omitted under any right or exemption claimed under a foreign state, and depending upon the law of nations. Acts March 2, 1833, chap. 57, § 7 (4 Stat. 634); Aug. 29, 1842, chap. 257 (5 Stat. 539); Feb. 5, 1867, chap. 28, § 1 (14 Stat. 385); Rev. St. § 753.

By the existing statutes, this court and the circuit and district courts, and any justice or judge thereof, have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any prisoner in jail who "is in custody in violation of the Constitution or of a law or treaty of the United

States"; and "the court or justice or judge, to whom the application is made, shall forthwith award a writ of habeas corpus, unless it appears from the petition itself that the party is not entitled thereto"; and "shall proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice may require." Rev. St. §§ 751-755, 761.

The power thus granted to the courts and judges of the United States clearly extends to prisoners held in custody, under the authority of a state, in violation of the Constitution, laws or treaties of the United States. But in the exercise of this power the courts of the United States are not bound to discharge by writ of habeas corpus every such prisoner.

The principles which should govern their action in this matter were stated, upon great consideration, in the leading case of *Ex parte Royall*, 117 U. S. 241; 6 Sup. Ct. 734, and were repeated in one of the most recent cases upon the subject, as follows:

"We cannot suppose that congress intended to compel those courts, by such means, to draw to themselves, in the first instance, the control of all criminal prosecutions commenced in state courts exercising authority within the same territorial limits, where the accused claims he is held in custody in violation of the Constitution of the United States. The injunction to hear the case summarily, and thereupon 'to dispose of the party as law and justice require,' does not deprive the court of discretion as to the time and mode in which it will exert the powers conferred upon it. That discretion should be exercised in the light of the relations existing, under our system of government, between the judicial tribunals of the Union and of the states, and in recognition of the fact that the public good requires that those relations be not disturbed by unnecessary conflict between courts equally bound to guard and protect rights secured by the Constitution." "Where a person is in custody, under process from a state court of original jurisdiction, and from an alleged offense against the laws of such case, and it is claimed that he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of his trial in the court in which he is indicted;

that discretion, however, to be subordinated to any special circumstances requiring immediate action. When the state court shall have finally acted upon the case, the circuit court has still a discretion whether, under all the circumstances existing, the accused, if convicted, shall be put to his writ of error from the highest court of the state, or whether it will proceed, by writ of habeas corpus, summarily to determine whether the petitioner is restrained of his liberty in violation of the Constitution of the United States." *Ex parte Royall*, 117 U. S. 241, 251-253; 3 Sup. Ct. 734; *New York v. Eno*, 155 U. S. 89, 93-95; 15 Sup. Ct. 30. In *Ex parte Royall* and in *New York v. Eno* it was recognized that in cases of urgency, such as those of prisoners in custody by authority of a state, for an act done or omitted to be done in pursuance of a law of the United States, or of an order or process of a court of the United States, or otherwise involving the authority and operations of the general government, or its relations of foreign nations, the courts of the United States should interpose by writ of habeas corpus.

Such an exceptional case was *In re Neagle*, 135 U. S. 1; 10 Sup. Ct. 658, in which a deputy marshal of the United States, charged under the Constitution and laws of the United States with the duty of guarding and protecting a judge of a court of the United States, and of doing whatever might be necessary for that purpose, even to the taking of human life, was discharged on habeas corpus from custody under commitment by a magistrate of a state on a charge of homicide committed in the performance of that duty.

Such, also, was *In re Loney*, 134 U. S. 372; 10 Sup. Ct. 584, in which a person arrested by order of a magistrate of a state for perjury in testimony given in the case of a contested congressional election, was discharged on habeas corpus, because a charge of such perjury was within the exclusive cognizance of the courts of the United States, and to permit it to be prosecuted in the state courts would greatly impede and embarrass the administration of justice in a national tribunal.

Such, again, was *Wildedhus' Case*, 120 U. S. 1; 7 Sup. Ct. 385, in which the question was decided on habeas corpus whether an arrest, under authority of a state, of one of the crew of a for-

eign merchant vessel, charged with the commission of a crime on board of her while within a port within the state was contrary to the provisions of a treaty between the United States and the country to which the vessel belonged.

But, except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus in advance of a final determination of his case in the courts of the state; and, even after such final determination in those courts, will generally leave the petitioner to the usual and orderly course of proceeding by writ of error from this court. *Ex parte Royall*, 117 U. S. 241; 6 Sup. Ct. 734; *Ex parte Fonda*, 117 U. S. 516; 6 Sup. Ct. 848; *In re Duncan*, 139 U. S. 449; 11 Sup. Ct. 573; *In re Wood*, 140 U. S. 278; 11 Sup. Ct. 738; *In re Jugiro*, 140 U. S. 291; 11 Sup. Ct. 770; *Cook v. Hart*, 146 U. S. 183; 13 Sup. Ct. 40; *In re Frederick*, 149 U. S. 70; 13 Sup. Ct. 793; *New York v. Eno*, 155 U. S. 89; 15 Sup. Ct. 30; *Pepke v. Cronan*, 155 U. S. 100, 15 Sup. Ct. 34; *Bergemann v. Backer*, 157 U. S. 655; 15 Sup. Ct. 727.

In a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence. But no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous.

The facts upon which the lawfulness of the imprisonment of this petitioner depends are obscurely and imperfectly presented in his petition and in the record transmitted to this court.

The general allegations in the petition that the petitioner is detained in violation of the Constitution and laws of the United States and of the Constitution and laws of the state of Connecticut, and is held without due process of law, are averments of mere conclusions of law, and not matters of fact. *Cuddy's Case*, 131 U. S. 280, 286; 9 Sup. Ct. 703.

The petition begins by alleging that the petitioner is a prisoner confined by the sheriff of the county of New Haven in the county jail for a supposed criminal offense, to wit, the crime of murder in the second degree, and that his imprisonment is by virtue of

a warrant, a copy whereof is in the possession of the sheriff. It also alleges that the petitioner was a citizen of Massachusetts, and was extradited from that state for said alleged crime, in January, 1895. So far, certainly, no unlawful imprisonment is shown.

The allegation that in August and September, 1893, he was tried before a local court in New Haven upon the same charge, and, upon a full hearing, was discharged by the court, would seem to point to a hearing and discharge upon an application for his committal to jail to await prosecution, rather than to a formal trial and acquittal, and, whatever effect it might have, if pleaded to a subsequent indictment, affords no ground for his discharge on habeas corpus. *Ex parte Bigelow*, 113 U. S. 328; 5 Sup. Ct. 542; *Ex parte Belt*, 159 U. S. 95; 15 Sup. Ct. 987.

It is then alleged that he remained in New Haven during at least two sessions of the grand jury, and then, early in 1894, removed to Massachusetts; and that in January, 1895, he was arrested in Massachusetts, and brought to New Haven upon a warrant of extradition, issued by the governor of Massachusetts, upon the demand of the governor of Connecticut, alleging that an indictment for murder had been found against him by the grand jury of the county of New Haven. These allegations are immaterial except as introductory to the remaining allegations of the petition.

One of those allegations is "that no indictment was ever found against him by any grand jury sitting at any time within the state of Connecticut, nor no indictment as and for a true bill was ever presented by any grand jury in said state of Connecticut against him, which he is ready to verify and prove; and any pretended indictment was found by mistake or misconception, and was not their true verdict or finding."

It is not alleged that it appears by the records of the court that no indictment was presented by the grand jury; and it is by no means clear that it was intended to allege anything more than an indictment, actually presented by the grand jury to the court, lacked the words, "A true bill," and was found by the grand jury by mistake and misconception. Such matters are proper subjects of inquiry in the courts of the state, but afford no ground

for interposition by the courts of the United States by writ of habeas corpus. In *re Wood*, 140 U. S. 278; 11 Sup. Ct. 738; In *re Wilson*, 140 U. S. 575; 11 Sup. Ct. 870.

The only allegation in the petition is that the petitioner was not, at the time of his extradition from Massachusetts a fugitive from the justice of Connecticut.

The record, independently of the opinion of the circuit court, does not show what, if any, evidence was introduced at the hearing upon which the writ of habeas corpus was discharged, and the prisoner left in custody. The case was heard by the circuit court, and not by the district judge at chambers or out of court. Had it been so heard by him, there could have been no appeal to this court from his decision. Rev. St. §§ 751, 752, 764; Act March 3, 1885, chap. 353 (23 Stat. 437); *Carper v. Fitzgerald*, 121 U. S. 87; 7 Sup. Ct. 825; *Lambert v. Barrett*, 157 U. S. 697; 15 Sup. Ct. 722. The subsequent correspondence between the district judge and the petitioner's counsel had no proper place in the record of the court, and it does not appear that the judge intended or expected his letter to be filed or recorded. In that letter he did no more than express his willingness that the record should be amended, provided it properly could be done. It does not appear that the judge afterwards allowed, or was requested to allow, any amendment of the record, or of the appeal; and the petitioner, or his counsel could not amend either the record or the appeal by his own act, without leave of the judge.

If, in order to ascertain what was proved, or offered to be proved at the hearing, we turn to the opinion filed in the court below and sent up with the record, it thereby appeared that the petitioner offered to prove that the indictment against him was procured by some mistake of the grand jury, and that he was not in fact a fugitive from justice; and that the judge assumed, for the purpose of the disposition of the writ of habeas corpus, that all the allegations of the petition were true.

But, if the opinion can be referred to as showing part of what took place at the hearing, it may likewise be referred to as showing other matters then before the court, and especially the proceedings for extradition.

As to those proceedings, the opinion (consistently with the alle-

gations of the petition, so far as anything upon the subject is distinctly and unequivocally alleged therein) not only states, as uncontroverted facts, that the petitioner was arrested in Massachusetts, and brought into Connecticut, under a warrant of extradition issued by the governor of Massachusetts, upon a requisition of the governor of Connecticut, accompanied by a certified copy of the indictment, and by an affidavit that the petitioner was a fugitive from justice, but expressly says that it was not denied that the demand upon the executive authority of Massachusetts, and his action thereon, were proper in form.

A warrant of extradition of the governor of a state, issued upon the requisition of the governor of another state, accompanied by a copy of an indictment, is *prima facie* evidence, at least, that the accused had been indicted, and was a fugitive from justice, and, when the court in which the indictment was found has jurisdiction of the offense (which there is nothing in this case to impugn), is sufficient to make it the duty of the courts of the United States to decline interposition by writ of *habeas corpus*, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted to be inquired into and determined, in the first instance, by the courts of the state, which are empowered and obliged, equally with the courts of the United States, to recognize and uphold the supremacy of the constitution and laws of the United States. *Robb v. Connolly*, 111 U. S. 624, 4 Sup. Ct. 544; *Ex parte Reggel*, 114 U. S. 642, 5 Sup. Ct. 1148; *Roberts v. Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; *Cook v. Hart*, 146 U. S. 183, 13 Sup. Ct. 40; *Pearce v. Texas*, 155 U. S. 311, 15 Sup. Ct. 116.

The return of the sheriff to the writ of *habeas corpus* does not (as it might well have done) set forth the indictment, and the warrant of extradition, as grounds for the detention of the prisoner. But any defect in the return in this respect affords no reason why the courts of the United States should take the prisoner out of the custody of the authorities of the state.

The return does show that the petitioner is held in custody by the sheriff by virtue of a mittimus issued to him by a justice of the peace, in accordance with sections 962 and 1613 of the Gen-

eral Statutes of Connecticut of 1887,¹ which authorize the surety on a recognizance either in civil or in criminal proceedings, upon making affidavit that his principal intends to abscond, to obtain from a justice of the peace a mittimus to commit him to jail.

The only objections taken by the petitioner to the sufficiency of this mittimus are: First, that it shows that the recognizance was entered into on the 17th of January, 1895, for his appearance "before the superior court to be holden at New Haven, within and for the county of New Haven, on the first Tuesday of January, 1895," which was a day already passed; and, second, that it describes him as "of the town of Newton, state of Massachusetts," while the statute only authorizes the issue of a mittimus by "a justice of the peace of the county in which such principal resides." But the first Tuesday of January was the day appointed by law for the beginning of the term of the superior court. Gen. St. Conn. section 1615. And the question whether the recognizance might be construed as requiring an appearance at a subsequent day in the course of the term, as well as the question whether the word "resides," as used in the statute, implies domicile or only presence in the county, is a question which should be left to the decision of the courts of the state.

There could be no better illustration than this case affords of the wisdom, if not necessity, of the rule established by the decisions of this court above cited, that a prisoner in custody under the authority of a state should not, except in a case of peculiar

¹ Sec. 962. Any bail or surety who has entered into a recognizance for the personal appearance of another, and shall afterwards believe that his principal intends to abscond, may apply to a justice of the peace in the county in which such principal resides, produce his bail bond, or evidence, of his being bail or surety, and verify the reason of his application by oath or otherwise; and thereupon such justice shall forthwith grant a mittimus, directed to a proper officer or indifferent person of such county, commanding him forthwith to arrest such principal, and commit him to the jail of such county; and the keeper of such jail shall receive such principal, and retain him in jail until discharged by due order of law; and such surrender of the principal shall be a full discharge of the surety upon his bond or recognizance.

Sec. 1613. Any surety in a recognizance in criminal proceedings, who believes that his principal intends to abscond, may have the same remedy, and proceed and be discharged in the same manner, as sureties upon bail bonds in civil actions.

urgency, be discharged by a court or judge of the United States upon a writ of habeas corpus, in advance of any proceedings in the courts of the state to test the validity of his arrest and detention. To adopt a different rule would unduly interfere with the exercise of the criminal jurisdiction of the several states, and with the performance by this court of its appropriate duties.

Order affirmed.

United States Supreme Court.

(December 23, 1895.)

KOHL v. LEHLBACK.

1. HABEAS CORPUS—STATE COURT.

A state court, which has jurisdiction of the offense charged and of the accused, must determine whether an indictment sufficiently charges the crime of murder in the first degree.

2. SAME—APPEAL.

An appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and a state may accord it to a person convicted of crime upon such terms as it thinks proper.

3. SAME—STATE COURTS.

Whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under the various acts of New Jersey, unless allowed by the chancellor of the state under section 83 of the Criminal Procedure Code, and, if so, under what circumstances and on what conditions, are matters for the state courts to determine.

4. SAME.

The supreme court of the United States can neither anticipate nor overrule the action of the state courts as to the right to review in an appellate court, since a denial of such a right altogether would constitute no violation of the Constitution of the United States.

5. SAME—CONSTITUTIONAL LAW.

The provision of the New Jersey statute that a juror shall not be excepted to on account of his citizenship after he has been sworn, does not violate the state constitution.

6. SAME—JUDGMENT.

A judgment of conviction is not invalid because one of the jurors was an alien, where no objection was made to him on this account.

Appeal from the Circuit Court of the United States for the District of New Jersey.

This is an appeal from an order of the circuit court of the United States for the district of New Jersey, entered May 10, 1896, denying a writ of habeas corpus on the petition of Henry Kohl therefor. Petitioner represented that he was indicted in the court of oyer and terminer and general jail delivery of Essex county, N. J., for the crime of murder, in December, 1894; that he moved to quash the indictment, which motion was denied, and an exception duly taken; that his trial commenced January 14th and ended January 25, 1895, in the rendition of a verdict of murder in the first degree; that on February 12th application was made for a new trial, and rule to show cause was granted and discharged February 14, 1895; that he was sentenced, February 21st, to be hanged on March 21, 1895; and that he was unlawfully held in imprisonment by Herman Lehlback, sheriff of Essex county, by virtue of said sentence.

It was also averred that "Samuel Ader, a juror on the jury that convicted your petitioner, is not, and never was, a citizen of the United States of America"; and that petitioner was restrained of his liberty in violation of the constitution and laws of the United States and of the state of New Jersey, in that petitioner was indicted for an offense having no existence under the laws of New Jersey, which recognized on such crime as murder, the common-law crime of murder having been divided by statute into two degrees, and the indictment not having distinctly set out the statutory crime.

Petitioner further showed that on the 27th day of February application for a writ of error was made to the chancellor of New Jersey, which was denied, and "that an appeal had been duly taken from the order of the said chancellor to the court of errors and appeals, where such appeals are reviewable, and said appeal is now pending in said court of errors and appeals in the state of New Jersey." It was further represented that petitioner was entitled, and desired, to have the verdict and all the proceedings on his trial, various objections and exceptions thereto having been made and taken, adjudicated by the highest courts of New Jersey; "that on the 6th day of April last past your petitioner's counsel

in open court, in the Essex oyer and terminer, in the presence of the prosecutor, presented a writ of error, signed by the clerk of the supreme court of New Jersey, sealed with the seal of said court, from the said supreme court to the said oyer and terminer; that the said court would not allow the writ, but permitted it to be filed with the clerk of said court; that said writ was presented under and by virtue of the act of 1881 of New Jersey; that the said act is valid and effectual, that the act of 1878 of New Jersey made writs of error writs of right in all cases"; and further, "that the presiding judge of the said oyer and terminer court has instructed the clerk of Essex county, who is the clerk of said oyer and terminer, not to furnish your petitioner's counsel with a copy of the record and proceedings in this case; that the supreme court of New Jersey has refused your petitioner a stay of execution, and your petitioner has exhausted all remedies in the state court."

The petition then assigned in repetition the several grounds on which it was contended that the conviction was unlawful, to the effect that the indictment was insufficient; that petitioner had been denied by the state of New Jersey the equal protection of the laws; and that petitioner's conviction not only was in violation of the laws of New Jersey, but of the fourteenth amendment of the constitution of the United States, because not by due process of law. And it was further alleged that under and by virtue of the sentence the sheriff of Essex county threatened to execute the sentence of death on petitioner May 16th, to which time he had been reprieved.

Arthur English, for appellant.

E. W. Crane, for appellee.

Mr. Chief Justice FULLER, after stating the acts in the foregoing language, delivered the opinion of the court.

In *Whitten v. Tomlinson*, 16 Sup. Ct. 297, the power vested in the courts and judges of the United States to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of persons held in custody under state authority, in alleged violation of the constitution, laws or treaties of the United States, is considered, and the principles which should

govern their action in the exercise of this power stated; and attention is there called to the necessary and settled rule that "in a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return, or controlled by other evidence, but no allegation of fact in the petition can be assumed to be admitted, unless distinct and unambiguous"; and that "the general allegations in the petition that the petitioner is detained in violation of the constitution and laws of the United States and of the constitution and laws of the particular state, and is held without due process of law, are averments of mere conclusions of law, and not of matters of fact." *Cuddy's Case*, 131 U. S. 280, 286; 9 Sup. Ct. 703.

1. Having jurisdiction of the offense charged and of the accused, it was for the state courts to determine whether the indictment in this case sufficiently charged the crime of murder in the first degree. *Caldwell v. Texas*, 137 U. S. 692, 698; 11 Sup. Ct. 224; *Bergemann v. Backer*, 157 U. S. 655; 15 Sup. Ct. 727.

In the latter case it was decided, in reference to a similar objection to the indictment to that made here, and upon an examination of the statutes and judicial decisions of the highest courts of New Jersey, that it could not be held that the accused was proceeded against under an indictment based upon statutes denying to him the equal protection of the laws, or that were inconsistent with due process of law, as prescribed by the fourteenth amendment to the constitution. *Graves v. State*, 45 N. J. Law, 203, 358; *Titus v. State*, 49 id. 36; 7 Atl. 621. We do not deem it necessary to reconsider in this case the conclusion there reached.

2. In *McKane v. Durston*, 153 U. S. 684; 14 Sup. Ct. 913, we held that an appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and that a state may accord it to a person convicted of crime upon such terms as it thinks proper; and in *Bergemann v. Backer*, *supra*, that the refusal of the courts of New Jersey to grant a writ of error to a person convicted of murder, or to say the execution of a sentence, will not itself

warrant a court of the United States in interfering in his behalf by writ of habeas corpus.

Appellant insists that he has been denied the equal protection of the laws because he has been deprived of a writ of error for the review of the record and proceedings in his case in violation of the laws of New Jersey.

Section 83 of the criminal procedure act of New Jersey, brought forward from section 13 of an act of March 6, 1795 (Pat. Laws N. J. p. 162) provided that "writs of error in all criminal cases not punishable with death, shall be considered as writs of right, and issue of course; and in criminal cases punishable with death, writs or error shall be considered as writs of grace, and shall not issue but by order of the chancellor for the time being, made upon motion or petition, notice whereof shall always be given to the attorney-general or the prosecutor for the state." Revision N. J. p. 283. By an act approved March 12, 1878, this section was amended so as to read; "Writs of error in all criminal cases shall be considered as writs of right and issue of course; but in criminal cases punishable with death, writs of error shall be issued out of and returnable to the court of errors and appeals alone, and shall be heard and determined at the term of said court next after the judgment of the court below, unless for good reasons the court of errors and appeals shall continue the cause to any subsequent term." Supp. Revision N. J. pp. 209, 210.

In *Entries v. State*, 47 N. J. Law, 140, a writ of error under this act was dismissed by the court of errors and appeals, the court holding that such writ would not go directly from that court to theoyer and terminer, and that "the legislature cannot sanction such a proceeding as it is one of the prerogatives of the supreme court to exercise in the first instance, jurisdiction in such cases."

By an act of March 9, 1881, it was provided in the first section that "in case a writ of error shall be brought to remove any judgment rendered in any criminal action or proceeding, in any court of this state, and such writ of error shall be presented to such court, the said writ of error shall have the effect of staying all proceedings upon the said judgment, and upon the sentence which the court or any judge thereof may have pronounced against the person or persons obtaining and prosecution the said writ of error,

pending and during the prosecution of such writ of error"; and by the second section, that pending the prosecution of such writ of error, the court may require the party prosecuting the writ to give bail, "provided, that this section of this act shall not apply to capital cases." Supp. Revision, p. 210. And by an act passed May 9, 1894, it was provided that the entire record of the proceedings on the trial of any criminal cause might be returned by the plaintiff in error with the writ of error and form part thereof, and if it appeared from said record that the plaintiff in error had suffered manifest wrong or injury in the matters therein referred to, the appellate court might order a new trial. Laws N. J. 1892, p. 246.

Clearly, whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under these various acts, unless allowed by the chancellor of the state under section 83 of the criminal procedure act, and, if so, under what circumstances, and on what conditions, are matters for the state courts to determine. Petitioner alleged that an appeal from the chancellor's order refusing a writ of error was pending in the court of errors and appeal, and also that a writ of error signed by the clerk of the supreme court of New Jersey, and sealed with the seal of that court, from the supreme court to the oyer and terminer, had been presented to the latter court under the act of 1881, but that the court of oyer and terminer would not allow the writ, and instructed its clerk not to furnish a copy of the record and proceedings. It is, however, averred that the supreme court had refused a stay of execution, so that it would appear that, if that court really issued a writ of error, it had either arrived at the conclusion that this was improvidently done, or that for other reasons it could not be maintained.

And the petition set up no action by the supreme court to compel its writ to be respected, and no effort on petitioner's part to procure such action, nor any effort to supply a copy of the record and proceedings. *Ableman v. Booth*, 21 How. 506, 512.

The averments in reference to this matter are so vague and indefinite that interference might well be declined for that reason. At all events, inasmuch as the right of review in an appellate court is purely a matter of state concern, we can neither anticipate

or overrule the action of the state courts in that regard, since a denial of the right altogether would constitute no violation of the constitution of the United States. What petitioner asks us to do is to construe the laws of New Jersey for ourselves, hold that they give a writ of error to the supreme court, and discharge petitioner on the ground either that the courts of New Jersey have arrived at a different conclusion and denied the writ, or have granted it and refused to make it effectual. In either aspect, we are unable thus to revise the proceedings in those courts.

3. It is further contended that petitioner was denied due process of law and the equal protection of the laws, in that one of the jurors by whom he was tried was an alien. The allegation of the petition is "that Samuel Ader, a juror on the jury that convicted your petitioner, is not, and never was, a citizen of the United States of America."

Nothing is said as to when this matter came to petitioner's knowledge, and, and for aught that appears, it may have been inquired into by the courts of New Jersey, and the fact determined to be otherwise than alleged, or the objection may have been raised after verdict, and overruled, because coming too late. The statute of New Jersey provides that every petit juror returned for the trial of any action of a criminal nature shall be a citizen of the state, and resident within the county from which he shall be taken, and above the age of twenty-one and under the age of sixty-five years; and if any person, who is not so qualified, shall be summoned as a juror on a trial of any such action in any of the courts of the state it shall be good cause of challenge to any such juror, "provided, that no exception to any such juror on account of his citizenship, or age, or any other legal disability, shall be allowed after he has been sworn or affirmed." Revision N. J. p. 582. This proviso is brought forward from an act of November 10, 1797 (Acts 22d Gen. Assem. N. J. 1797, p. 250). The constitution of New Jersey of 1776 provided that "the inestimable right of trial by jury shall remain confirmed as a part of the law of this colony, without repeal, forever." Section 22. And the constitution of 1844 declares that "the right of trial by jury shall remain inviolate." Article 1, § 7. It is urged that the above-mentioned proviso, which has been part of the laws of New Jersey for nearly

100 years, should now be held by this courts contrary to the constitution of that state, although the courts of the state may have held it in this case in harmony therewith, and have certainly not pronounced it invalid.

The line of argument seems to be that by the common law as obtaining in New Jersey an alien was disqualified from serving on a jury; that the disqualification was absolute; in that particular under the state constitution; that the proviso was, therefore, void; and that, if an alien sat upon a jury, the common-law right of trial by jury would have been invaded. So far as the petition shows, this contention may have been disposed of adversely to petitioner by the state courts; and, moreover, we are of opinion that in itself it cannot be sustained as involving an infraction of the constitution of the United States.

In *Hollingsworth v. Duane*, reported in Wall. Sr. 147, Fed. Cas. No. 6,618, and also, but imperfectly, in 4 Dall. 353, it was held by the circuit court of the United States for the Eastern district of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but is not per se sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law as shown by authorities cited from the Year Books and otherwise.

In *Wassum v. Feeney*, 121 Mass. 93, the snpreme judicial court of Massachusetts held that "a verdict will not be set aside because one of the jurors was an infant, where his name was on the list of jurors returned and impaneled, though the losing party did not know of the infancy until after the verdict." And Mr. Justice Gray, then chief justice of Massachusetts, delivering the opinion, said: "When a party has had an opportunity of challenge no disqualification of a juror entitles him to a new trial after verdict. This convenient and necessary rule has been applied by this court, not only to a juror disqualified by interest or relation (*Jeffries v. Randall*, 14 Mass. 205; *Woodward v. Dean*, 113 Mass. 297), but even in a capital case, to a juror who was not of the country or vicinage, as required by the constitution (Declaration of Rights, art. 13; *Anon.*, cited by Jackson, J., in 1 Pick. 41, 42). The same rule has been applied by other courts to disqualification by reason of alienage, although not in fact known until after ver-

dict. *Hollingsworth v. Duane*, 4 Dall. 353; Wall. Sr. 147; Fed. Cas. No. 6,618; *State v. Quarrel*, 2 Bay. 150; *Presbury v. Com.*, 9 Dana, 203; *King v. Sutton*, 8 Barn. & C. 417; Same Case, nom. *King v. Despard*, 2 Man. & R. 406. In the Case of Chelsea Waterworks Co., 10 Exch. 731; Baron Parke said: "In the case of a trial by a jury de medietate linguæ, which by the forty-seventh section of the jury act [6 Geo. IV. ch. 50] is expressly reserved to an alien, he may not know whether proper persons are on the jury; yet, if he was found guilty, and sentenced to death, the verdict would not be set aside because he was tried by improper persons, for he ought to have challenged them.' See, also, Case of a Jurymen, 12 East, 231, note; *Hill v. Yates*, Id. 229."

The great weight of authority is to that effect,¹ though there are a few cases to the contrary. Thus in *Guykowski v. People*, 1 Scam. 476, it was held that a new trial should be granted because one of the jurors was an alien when sworn, of which fact the defendant was ignorant at the time; but in *Greenup v. Stoker*, 3 Gilman, 202, the supreme court at Illinois, though Purple, J., reluctantly concluded that it was not indispensable to hold that that case was not the law, but limited its application to capital cases; and in *Chase v. People*, 40 Ill. 352, it was finally overruled. Mr. Justice Breese spoke for the court, and it was held that alienage in a juror was not a positive disqualification, but ground of exemption or of challenge, and nothing more.

It has been held that under the constitution of New York the defendant in a capital case cannot consent to be tried by less than a full jury of twelve men (*Cancemi v. People*, 18 N. Y. 128), and that under the constitution of California, a law authorizing a change of the place of trial of a criminal action to another county than that where the crime was committed on application of the prosecution without defendant's consent was invalid (*People v. Powell*, 87 Cal. 348; 25 Pac. 481); but in neither of these cases was it intimated that objection to individual jurors could not be waived by the accused, or that trial by jury would be violated if persons who were open to challenge happened to be impaneled. The disqualification of alienage is cause of challenge propter defectum, on account of personal objection, and if voluntarily, or through negligence, or want of knowledge, such objection fails to

be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. *U. S. v. Gale*, 109 U. S. 65, 71; 3 Sup. Ct. 1. Whether, where the defendant is without fault, and may have been prejudiced, a new trial may not be granted on such a ground, is another question. That is not the inquiry here, but whether the law of New Jersey is invalid under the constitution of that state, and this judgment void, because one of the jurors who tried petitioner may have been an alien. If prior to the filing of the petition, the objection had been brought before the state courts, and overruled, we perceive no reason for declining to be bound by their view of the effect of the state constitution; and if the matter had not been called to their attention, it does not appear why that should not have been, or should not now be done.

In any view, we cannot hold, on this petition, that petitioner has been denied due process of law, or that protection of the laws accorded to all others similarly situated.

The circuit court was right in declining by writ of habeas corpus to obstruct the ordinary administration of the criminal laws of New Jersey through the tribunals of that state (*In re Wood*, 140 U. S. 278, 289; 11 Sup. Ct. 738), and its order is affirmed.

United States Supreme Court.

(December 19, 1895.)

MARKHAM v. UNITED STATES.

INDICTMENT—PERJURY.

An indictment for perjury, which gives the name of the officer before whom the alleged false oath was taken, avers that he was competent to administer an oath, sets forth the very words of the statement alleged to have been willfully and corruptly made by the accused, and charges that such false statement was part of a deposition given and subscribed by the

accused before that officer and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions of United States, is sufficient under the statute.

2. SAME—SECTION 5396.

Section 1025 of 2 Rev. St., does not dispense with the requirement of section 5396 that an indictment for perjury shall set forth the substance of the offense charged.

In Error to the district court of the United States for the district of Kentucky.

The plaintiff in error was indicted in the district court of the United States for the district of Kentucky for the crime of perjury, as defined in section 5392 of the Revised Statutes.

The defendant pleaded not guilty. The first and second counts related to certain statements by the accused, alleged to have been willfully, falsely, and feloniously made, in a deposition, given, under oath, before G. C. Loomis, a special examiner of the pension bureau of the United States, such statements being material to an inquiry pending before the commissioner of pensions in reference to a claim of the accused for a pension from the United States. The third count set out another statement of the accused in the same deposition, and charged that he did not believe it to be true.

The defendant was found guilty upon the fourth count of the indictment, which was as follows :

“ And the grand jurors aforesaid, upon their oaths aforesaid, do further present that at Bowling Green, in the district aforesaid, on the seventh day of October, in the year of our Lord eighteen hundred and ninety-two, the matter of the hereinafter mentioned deposition became and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions of the United States, at Washington, in the District of Columbia, whereupon said William H. Markham did then, at said Bowling Green, willfully and corruptly take a solemn oath before G. C. Loomis, then and there a special examiner of the pension bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath ; that a certain deposition then and there by said Markham subscribed was then and there true, and in giving said deposition said Mark-

ham was asked by said Loomis a question in substance and effect as follows, to wit: 'Have you received any injury to forefinger of right hand since the war, or since your discharge from the army?' by which said question said Loomis referred, and said Markham well understood said Loomis to refer, to the right hand of said Markham. And in answer to said question said Markham then and there made and subscribed an answer and statement in substance and effect as follows, to wit: 'No, sir; I never have,—which said statement that said Markham never had received any injury to the forefinger of his right hand since his (said Markham's) discharge from the army was then and there material to said inquiry, and was then and there not true; whereas, in truth and in fact, the said Markham had then and theretofore received an injury to the forefinger of his (said Markham's) right hand, as he, the said Markham, then and there very well knew. And so the jurors aforesaid, upon their oath aforesaid, say that said Markham did commit willful and corrupt perjury, in the manner and form as in this count aforesaid, against," etc. There was no demurrer to the indictment nor any motion to quash either of the counts.

The defendant moved for an arrest of judgment upon the following grounds: (1) That the count upon which he was found guilty charged no offense under this statute. (2) That its averments did not inform the court that any offense had been committed, nor show that Loomis, the examiner, was authorized to administer the oath alleged. (3) That the averments did not set the proceeding or cause in which the defendant was charged to have given his disposition, or made oath to the statement alleged to be false, in such manner as to show that the disposition and the alleged false statement were material to any inquiry or matter before the commissioner of pensions, nor to what said inquiry related, nor show that Loomis, special examiner had any lawful authority to swear or require the defendant to swear to the deposition or statement averred to be false, nor for what purpose, nor upon what cause, or investigation of what claim, or of any claim pending before any department of the government, or in any court. (4) That it did not aver facts sufficient to show the mate-

riality of the oath or statement alleged to have been made. (5) That the words charged to have been sworn to by defendant were not averred to have been sworn to willfully and corruptly (6) That it failed to aver what charge was under investigation.

The motion in arrest of judgment was overruled, and the accused was sentenced to make his fine to the United States by the payment of \$5, and to be imprisoned at hard labor in the Indiana state prison, south, at Jeffersonville, Ind., for the full period of two years from a day named. From that judgment the present writ of error was prosecuted.

Samuel McKee, for plaintiff in error.

Asst. Att. Gen. Whitney, for the United States.

Mr. Justice HARLAN, after stating the facts as above, delivered the opinion of the court.

The contention that the indictment was insufficient in law cannot be sustained.

By section 4744 of the Revised Statutes, as amended by the act of July 25, 1882, chap. 349, it is provided: "The commissioner of pensions is authorized to detail from time to time clerks or persons employed in his office to make special examinations into the merits of such person or bounty land claims, whether pending or adjudicated, as he may deem proper, and to aid in the prosecution of any party appearing on such examinations to be guilty of fraud, either in the presentation or in procuring the allowance on such claims; and any person so detailed shall have power to administer oaths and take affidavits and depositions in the course of such examinations, and to orally examine witnesses, and may employ a stenographer, when deemed necessary by the commissioner of pensions, in important cases, such stenographer to be paid by such clerk or person, and the amount so paid to be allowed in his accounts." Rev. St. § 4744 (22 Stat. 175.) And by section 3 of the act of March 3, 1891, chap. 548, it was provided: "That the same power to administer oaths and take affidavits, which by virtue of section forty-seven hundred and forty-four of the Revised Statutes is conferred upon clerks detailed by the commissioner of pensions from his office to investigate sus-

pected attempts at fraud on the government through and by virtue of the pension laws, and to aid in prosecuting any person so offending, shall be, and is hereby, extended to all special examiners or additional special examiners employed under authority of congress to aid in the same purpose." 26 Stat. 1083.

In view of these enactments, the averment that the oath, charged to have been willfully and corruptly taken "before G. C. Loomis, then and there a special examiner of the pension bureau of the United States, and then and there a competent officer and having lawful authority to administer said oath," was sufficient, in connection with the statute, to inform the accused of the official character and authority of the officer before whom the oath was taken.

It is provided by section 5392 of the Revised Statutes that "every person who, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or other certificate by him subscribed is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall be punished by a fine of not more than two thousand dollars, and by imprisonment, at hard labor not more than five years, and shall, moreover, thereafter be incapable of giving testimony in any court of the United States until such time as the judgment is reversed."

And by section 5396 it is declared that, "in every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record or proceeding, either in law or equity, or any affidavit, deposition, or certificate, other than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed."

The requirement that it shall be sufficient in an indictment for perjury to set forth the substance of the offense is not new in the statutes of the United States. It is so provided in the crimes act of April 30, 1790 (1 Stat. 112, 116, chap. 9, § 18); and the latter act, in the particular mentioned, was the same as that of 23 Geo. II., chap. 11 (7 British Stat. at Large [Ed. 1769] p. 221). Referring to the English statute, and to the objects for which it was enacted, Mr. Chitty says that the substance of the charge is intended in opposition to its details. 2 Cr. Law 307; King v. Dowlin, 5 Term. R. 311, 317.

Did the fourth count set forth the substance of the offense charged? It gave the name of the officer before whom the alleged false oath was taken; averred that he was competent to administer an oath; set forth the very words of the statement alleged to have been willfully and corruptly made by the accused; and charged that such false statement was part of a deposition given and subscribed by the accused before that officer and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions of the United States.

The question propounded to the accused, and to which he was alleged willfully and corruptly to have made a false answer, manifestly pointed to an inquiry pending before the commissioner of pensions, in relation to himself as a former soldier in the army; that inquiry presumably related to a claim by him for a pension on account of personal injuries received by him in the service; and the general charge that the statement was made with reference to a pending inquiry before and within the jurisdiction of, the commissioner of pensions, in connection with the distinct, though general, averment that such statement was material to that inquiry, was quite sufficient under the statute. Under the plea of not guilty, the government was required to show the materiality of the alleged false statement, and, in so doing, must necessarily have disclosed the precise nature of the inquiry to which it related. And it may well be assumed, after verdict, that all such facts appeared in evidence, and that the accused was not ignorant of the nature of the inquiry to which his deposition related, and to which the indictment referred.

It was not necessary that the indictment should set forth all

the details or facts involved in the issue as to the materiality of such statement, and the authority of the commissioner of pensions to institute the inquiry in which the deposition of the accused was taken. In 2 Chit. Cr. Law, 307, the author says: "It is undoubtedly necessary that it should appear on the face of the indictment that the false allegations were material to the matter in issue. But it is not requisite to set forth all the circumstances which render them material. The simple averment that they were so will suffice." In *King v. Dowlin*, above cited, Lord Kenyon said that it had always been adjudged to be sufficient, in an indictment for perjury, to allege generally that the particular question became a material question. So, in *Com. v. Pollard*, 12 Metc. (Mass.) 225, 229, which was a prosecution for perjury, it was said that it must be alleged in the indictment that the matter sworn to was material, or the facts set forth as falsely and corruptly sworn to should be sufficient in themselves to show such materiality. In *State v. Hayward*, 1 Nott & McC. 546, 553, which was also a prosecution for perjury, the court, after observing that it should appear on the face of the indictment that the false allegations were material to the matter in issue, adjudged that it was not necessary "to set forth all the circumstances which render them material. The simple averment that they became and were so will be sufficient." Many other authorities are to the effect that the substance of the offense may be set forth, without incumbering the indictment with a recital of its details and circumstances.

As the count in question set forth the words of the alleged false statement, and thereby made it impossible for the accused to be again prosecuted on account of that particular statement; as it charged that such statement was material to an inquiry pending before, and within the jurisdiction of, the commissioner of pensions; and as the fair import of that count was that the inquiry before the commissioner had reference to a claim made by the accused under the pension laws, on account of personal injuries received while he was a soldier, and made it necessary to ascertain whether the accused had, since the war, or after his discharge from the army, received an injury to the forefinger of his right hand,—we think that the fourth count, although unskill-

fully drawn, sufficiently informed the accused of the matter for which he was indicted, and therefore met the requirement that it should set forth the substance of the charge against him.

It is proper to add that section 1025 of the Revised Statutes, providing that "no indictment found and presented by a grand jury in any district or circuit or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceedings thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant," is not to be interpreted as dispensing with the requirement in section 5396 that an indictment for perjury must set forth the substance of the offense charged. An indictment for perjury that does not set forth the substance of the offense will not authorize judgment upon a verdict of guilty. *Dunbar v. U. S.*, 156 U. S. 185 192; 15 Sup. Ct. 325.

We perceive no error of law in the record, and the judgment is affirmed.

Supreme Court of North Carolina.

(December 23, 1895.)

STATE v. LYTLE.

1. CRIMINAL LAW—VENUE.

Where, under section 1194 of the Code, the indictment charges an offense in a certain county, but there is no evidence of venue, the presumption is that it was committed in the state.

2. EVIDENCE—ARSON—THREATS.

On a trial for arson, evidence of threats made by defendant to burn the building is admissible to establish motive in a case by circumstantial evidence.

3. EVIDENCE—IDENTITY.

On such trial, evidence as to identity of the defendant with the person committing the crime was held to be admissible.

Appeal from a judgment convicting defendant of arson.

Adams & Parker, for appellant.

The Attorney General and Lock Craig, for the State.

FURCHES, J. — The exceptions not appearing very plainly from the record, it was agreed by the attorney general and Mr. Adams, who represented the defendant, to submit the case on three exceptions: (1) That there was no evidence that the offense charged (burning a barn) was committed in Buncombe county; (2) as to the admission of evidence that defendant had threatened to burn the barn; and (3) the court erroneously allowed the evidence of Dawkins as to seeing defendant the night of the fire.

The first exception cannot be sustained. The indictment charged the offense to have been committed in Buncombe county. Defendant pleaded not guilty, and went to trial, and there was no evidence introduced to show that the offense was committed in Buncombe county, or any other county. It was in evidence that it was within eleven miles of Asheville. But we will leave this evidence out of the case in considering this exception. There was no such point made on the trial; no request that the court should rule upon this question; no instruction asked as to this point. But the question is attempted to be raised by the exception as to the charge of the court that, there being no evidence on this point the court should have directed the jury to return a verdict of not guilty. For this position the counsel for defendant cited *State v. Revels*, Busb. 200, which tends to sustain his position. And while this case was decided in 1853, it seems to have been put upon the question of sufficient evidence, and a case in 6 E. C. L. 413, is cited as authority. And the statute of 1844 (Code, § 1194) seems to have been entirely overlooked. This statute reversed the rule which seems to have obtained on trials of criminal cases before its enactment. It was intended to do so, and we must hold that it did do so. It provided that it should be presumed that the offense was committed within the county in which the indictment charges it to have been committed, and makes it a matter of defense, if this is denied by defendant, to be taken advantage of by plea in abatement, if it is alleged to have occurred in another county of this state, as held in *State v. Outerbridge*, 82 N. C. 617; or, where it is insisted that it was not in this state at all, it may be shown as a matter of defense under the general issue, as in *State v. Mitchell*, 85 N. C. 674. These cases clearly establish the rule in such cases, under the statute of 1844, *supra*, to be a matter

of defense, and overrule the case of *Stave v. Revel*, supra. But it was insisted by counsel for defendant that the act of 1844 only made this presumption as to the county in which the offense was committed, and it made no presumption that it was committed within the state. But it would be so illogical to say that it was committed in Buncombe county, which is a part of the state, and then say it was not committed within the state, that we must decline to give this proposition our assent.

The second exception cannot be sustained. One Van Allen, among other things, testified that in a conversation with defendant a short time before the burning, in which defendant was complaining of the prosecutor Merrill's claiming too much rent, the witness asked defendant what he was going to do about it, when defendant replied: "I'll burn it! I'll burn it! I'll burn it!" This evidence was objected to by defendant, allowed by the court, and defendant excepted, and cites *State v. Norton*, 82 N. C. 628, in support of his exception. But this case is distinguishable from *Norton's Case*. That was an indictment for assault and battery. There was no dispute as to the parties engaged in the difficulty, and it was held to be incompetent, as it could not tend to explain the fight. But in that case it is said that it is competent in cases where it became material to show intent. This case is a case of circumstantial evidence. The fact that the barn was burned was not denied. But who did it? was the question. The state alleged that it was the defendant, and offered this evidence as one fact, or link in the chain, connecting the defendant with the burning; that he had the motive which is always considered a leading fact in circumstantial evidence. And in this view threats were allowed to be proved in *State v. Rhodes*, 111 N. C. 647; 15 S. E. 1038; *State v. Thompson*, 91 N. C. 496; 1 S. E. 921; *State v. Gailor*, 71 N. C. 88,—all of these cases being for burning houses, and they were all approved by this court.

The third exception cannot be sustained. John Dawkins, among other things, testified: "I recollect the night when the barn was burnt. I met a man whom I took to be Lytle. I was in seven step of him, the man whom I took to be Lytle, in the road, near my house. He was a low, chunky man. It was too dark to see whether he was white or black. He had his back to

me; had on a dark sack coat. I have known Lytle ten years. Have seen him often. Had I spoken to him, I would have called him Lytle. This was almost 7:30, on the Howard Gap road. This was the night the barn was burnt." This evidence was objected to, allowed, and defendant excepted; and *State v. Thorp*, 72 N. C. 186, is cited to sustain the exception. But it will be seen that this case is easily distinguishable from *Thorpe's Case*. That case holds that a witness should not be allowed to give his "impression as to matters of which he has no personal knowledge"; that is, he should not be allowed to give the results of his mind—his reasoning—as evidence, but only the results produced on his senses, as seeing, hearing, etc. In fact, the case of *State v. Thorp* sustains the ruling of the court, as does also that of *State v. Rhodes*, *supra*. It is true that it appears from the evidence sent up that, upon cross-examination by defendant, the witness Dawkins said: "I only judged it was Lytle from his chunky build, and the fact that I had heard he had gone upon the road that day." If this had been the evidence called out by the state under the objection of defendant, we would have held that the latter part of the sentence ("and the fact that I had heard he had gone up the road that day") was improper as a means of identifying Lytle. This would have fallen within the criticism of Judge Reade in delivering the opinion in *State v. Thorp*, *supra*. But there are two reasons why it cannot avail the defendant here: It was called out by him on cross-examination, and it was not objected nor expected to.

Affirmed.

Supreme Court of North Carolina.

(November 26, 1895.)

STATE v. GADBERRY.

CRIMINAL LAW—HOMICIDE—INSTRUCTIONS.

Under Act February 11, 1893, it is error to instruct the jury, on a trial for murder, that, if they believe the evidence, the defendant is guilty of murder in the first degree, though defendant offers no evidence, and all the evidence for the state tends to show only murder in the first degree.

FED. CRIM. REP., VOL. I.—11

Appeal from superior court, Yadkin county; BROWN, Judge
William Gadberry was convicted of murder in the first degree
and appeals. Reversed.

The court instructed the jury, after reciting all the evidence, that if they believed the evidence to be true beyond a reasonable doubt, the prisoner was guilty of murder in first degree. There were no exceptions to evidence. The court explained to the jury the degrees of murder, and also stated that the credibility of the evidence was a question peculiarly for the jury, and that in a case of this importance the jury should exercise great care, and weigh the evidence well, and be fully convinced of its truth before convicting.

A. E. Holton, for appellant.

The Attorney-General, for the state.

FURCHES, J.—The facts in this case present a very bad tragedy, to use no stronger word. But we have nothing to do with that. This is a court of appeals upon errors of law appearing in the transcript of record. We do not try the prisoner, but simply pass upon the correctness of the trial below. And if we shall find error in the trial below, this does not acquit the prisoner, but only sends the case back for another trial. The state introduced evidence showing the homicide, that defendant was the author of the homicide, and the attending and surrounding circumstances, and rested the case. The defendant introduced no evidence, and the court charged the jury, if they believed the evidence, the defendant was guilty of murder in the first degree. This charge is the error assigned and complained of by the defendant.

The evidence, as the case comes to us, would have been sufficient to have authorized the court to instruct the jury that if they believed the evidence it would be their duty to find the defendant guilty of murder, prior to the act of the 11th of February, 1893 (Acts 1893, p. 76), and guilty of murder in the second degree under this act. But this act created an era in the law of homicide in this state. Before that time we had but one offense of murder, and the penalty for this offense was death. But the act of 1893 divided murder into two degree, first and second degrees. This

act continues the death penalty as to the first degree, but makes the penalty for murder in the second degree imprisonment in the penitentiary for not less than two and not more than thirty years. It enacts in section 1: "All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death." Section 2: "All other kinds of murder shall be deemed murder in the second degree and shall be punished with imprisonment of not less than two, nor more than thirty years in the penitentiary." Section 3: "* * * But the jury before whom the offense is tried shall determine in their verdict whether the crime is murder in the first or second degree." This statute being of recent date, we have had but few cases before use involving its construction. Many of the states of the Union had preceded us in enacting this and similar statutes; Pennsylvania being the first. She passed a statute, from which ours is taken, and very nearly, if not entirely, the same as the Pennsylvania statute of 1794. The fact was called to our attention on the argument both by the attorney general and Mr. Holton, who argued the case for the defendant. And as the Pennsylvania statute had often been before the Pennsylvania courts for construction, — which court is recognized as one of the ablest in the Union, — we were recommended by both these attorneys to consult the Pennsylvania reports, and both cited us to Pennsylvania decisions and construing their statute. The attorney general referred to the case of *Com. v. Smith*, in 2 Serg. & R. 300, decided in 1816, which seems to support his contentions; while, on the other hand, the counsel for the defendant cited *Lane v. Com.*, 59 Pa. St. 371, delivered in 1868. This case to have been thoroughly considered; and from the fact of the high standing of the court, as well as the fact that we were referred specially to this court for aid in construing our statute, which is almost, if not identically, the same as theirs, and from the further fact of the great similarity in the facts and the charge of the court in that case to ours, we are induced to make several quotations from that case. The defendant in that case was in-

dicted for the murder of his wife, and "the commonwealth gave evidence that the deceased died by means of poison, and that it had been administered to her by the prisoner." The court charged the jury, "If your verdict is, 'Guilty of murder,' you must state 'of the first degree'; if 'Not guilty,' you say so, and no more."

The jury returned a verdict of murder in the first degree. The prisoner sued out a writ of error, and the supreme court delivered thereon the opinion from which we are quoting. The court say, in discussing this charge: "Hence it would seem to be more than ever material that the jury be charged with the responsibility and duty of finding the degree. That it is a material fact to be found is not to be denied or doubted. The statute makes it so, and with it all our decisions accord. But it is argued that, where the facts bring the case within either of the killings declared murder in the first degree, it being the duty of the jury to find a verdict in accordance therewith, a peremptory direction to find that degree is proper and right. To admit this would be to determine that this portion of the verdict is matter of form, and to substitute a court to do that which the law says the jury shall upon their oaths do.

* * * Many men have been convicted of murder in the second degree who, really guilty of a higher crime, would have escaped punishment altogether but for the distinction in degrees so carefully committed to juries by the statute." In *Rhodes v. Com.*, 48 Pa. St. 396, the theory of the prosecution was that the murder was committed by the prisoner in perpetrating the crime of robbery, for the prosecutor's house was robbed that day; and the prosecution claimed a conviction on that ground; and the judge, in his charge to the jury, used almost the same language which the judge did in this case. The language was: "If you find the defendant guilty, your verdict must state, 'Guilty of murder in the first degree, in the manner and form as he stands indicted.' If not guilty, your verdict will simply be, 'Not guilty.'" The same reason was urged in the justification of this instruction as was urged here namely, that the evidence exhibited a case of robbery by the hands of the prisoner, and therefore it must be murder in the first degree, if anything. For so instructing, that court felt constrained to reverse the sentence. WOOD, C. J., after noticing the change made by the statute in the common law in respect to degree in murder,

and the duty of the jury under the statute to find the degree, said :
“ Yet the judge assumes the province of the jury, and ascertained the degree in this instance, though this was a conviction by trial, and not by confession. Nothing less can be made out of his words, ‘ If you find the defendant guilty, your verdict must state “ Guilty of murder in the first degree.” ’ Was this leaving the degree to the jury to find ? Most clearly not. It excludes all chance of deliberation on the degree, and left to them only the question of guilty or not guilty. It is vain to argue that the judge was more competent to fix the degree than the jury, or that the circumstances proved the crime to be murder in the first degree, if murder at all ; for the statute is imperative that commits the degree to the jury. It was proper for the judge to advise them of the distinction between the degrees, to apply the evidence, and to instruct them to which of these degrees it pointed. But to tell them they must find the first degree was to withdraw the point from the jury, and decide it himself. * * * The charge being intended to be peremptory, * * * we think it impinged too strongly on the province of the jury. It did not leave them free to deliberate and fix a degree. * * * The judge decided it, and not the jury. * * * The court always leaving them [the jury], however, free to deliberate upon and the duty and responsibility of finding the degree, if they convict.” So we see that, so far as the case of *Lane v. Com.* is concerned, it settles this case, if we adopt it as authority. And while we do not feel bound to do this, we see no reason why we should not. It is construing a statute identical with ours. It is from a court of high authority and appears to have been well considered and well discussed. We have no opinions of our own in conflict with it. In fact the principal case we have where this statute is discussed (*State v. Fuller*, 114 N. C. 885; 19 S. E. 797), so far as it goes, is in harmony with the reasoning in this Pennsylvania case. The reasoning, to our minds, is so clear and sound, we feel no hesitation in adopting it, which we do, and it disposes of this case. It fully covers both views of it presented by the attorney general,—that the court below should be sustained because it appeared the prisoner was in the act of committing another felony, to wit an abduction of the deceased at the time the homicide took place, which put the case

within the first degree; and secondly, that the jury would have found the same issue from the evidence if the court had left it to them to determine. But we see from the reasoning in *Lane's Case*, *supra*, that neither of these positions can be sustained. The statute in our state, as it does in Pennsylvania, by express terms confers this duty upon the jury to determine the degree, and it cannot be taken from them by the court.

There were other views of this case presented by the defendant, but, being so well convinced that the consideration of the construction of the statute determine the case, we have not thought it necessary to enter into a discussion of them. There is error, and a *venire de novo* is ordered.

VERY, J. (concurring). — It must be admitted that if the members of this court were jurors, impaneled to try the prisoner upon the testimony offered in the court below, and considered the witnesses worthy of credit, they would not hesitate to concur in declaring the prisoner guilty of murder in the first degree. Revolting as his conduct seems to have been, and probably was, if the able judge who presided had, after learning of the facts from a preliminary examination upon a writ of habeas corpus, held that the prisoner was so clearly guilty of murder in the first degree that he would hear the evidence himself without impaneling a jury, and pronounce the sentence of the law upon him, the average citizen, regardless of his knowledge of the forms and technicalities of law, would understand that the fundamental right of trial by jury, acquired at the cost of blood and treasure, had been wantonly violated. The most unlearned and inexperienced of our people know that the constitution (article 1, § 13) provides that no person shall be convicted of any crime but by the unanimous verdict of a jury of good and lawful men, in open court. The legislature, as it was authorized to do, and as every other legislature which has enacted a statute grading homicides has done, provided that the "jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." The language of our statute (Code, § 413) is equally explicit in declaring that "no judge in giving a charge to the petit jury in a civil or criminal action shall give an opinion

whether a fact is fully or sufficiently proved, such matter being the true office and province of the jury, but he shall state in a plain and correct manner the evidence given in the case and declare and explain the law arising thereon." The law provides plainly, first, that the jury have the exclusive right "to determine in their verdict" the grade of the homicide; and second prohibits the judge, in terms quits as unmistakable, from telling the jury whether any fact is fully or sufficiently proved. We have decided (*State v. Fuller*, 114 N. C. 885; 19 S. E. 797), as has every respectable court in the United States where a similar statute has been passed, that when it is proved or admitted that the accused killed with a deadly weapon, the common law raises, if any at all no more serious presumption than that the prisoner is guilty of murder in the second degree, but that it is the province of the jury to say whether they will, from the testimony, draw the inference that the prisoner premeditated the killing. The solution of the question whether the killing was premeditated involves a finding of what was the purpose in a person's breast, to be gathered as an inference from his acts. The law declares that the jury shall determine (upon finding the intent or purpose of the prisoner from the evidence as to his conduct under the definition of murder in the first and second degrees given them for their guidance by the court) how they will classify the offense. The law limited the authority and duty of the judge to defining the grades of homicide, and pointing to the evidence relied upon to establish guilt of either. Instead, however, of telling the jury that it was their province to determine under his explanation of the law whether the prisoner, for however short a time, entertained the preconceived purpose to kill, he assumed the authority to decide what the law gave the jury the exclusive right to determine. He told the jury, when the law prohibited his doing so, that the proof was sufficient to make it their duty to return a verdict of guilty of murder in the first degree. If it became necessary for the jury, before fixing the grade, to inquire whether they were warranted in inferring from the evidence that there was a previous purpose to kill, the judge violated the statute when he told them that a purpose to kill was to be irresistibly inferred, or was fully or sufficiently shown by testimony as to any conflict, however

outrageous. If, upon the suggestion of the attorney general, we attempt to sustain the instruction upon the idea that the evidence tended to show an attempt on the part of the prisoner to abduct the deceased, the same insurmountable difficulty presents itself. We cannot repeal, and the judge below could not disregard, the plain provision of law that the jury must fix the grade. In the discharge of that duty it necessarily became their province to inquire and ascertain whether the evidence of the conduct of the prisoner convinced them of his purpose to abduct. If the language of the judge is to be construed as meaning that the jury must infer a purpose to abduct,—of the existence of which it was their exclusive province to judge,—then he violated the statute in expressing the opinion that the intent to abduct was fully proved.

No principle is more clearly established than that, where guilt depends upon intent, a special verdict which omits to find the intent is imperfect, and no judgment can be pronounced upon it. If, in this case, the jury had been permitted to return as a special verdict the testimony of the mother of the girl, with all of its revolting details, but had failed to add that they found either that the prisoner had killed in the execution of a premeditated intent or that his purpose in driving the girl before him was to abduct her, it is settled law that the court could not pronounce judgment. *State v. Blue*, 84 N. C. 807; *State v. Oakley*, 103 id. 408; 9 S. E. 575; *State v. Curtis*, 71 N. C. 61; *State v. Lowry*, 74 id. 121. In *State v. Bray*, 89 N. C. 481, the court said: "The special verdict is defective, in that the intent is not found as a fact. There may be evidence of intent but the fact is not found by the jury. * * * The jury must find the fact from the evidence before them, and the intent is a question for the jury. * * * Whether, if the fact of felonious intent were found in the special verdict, the facts would constitute the offense of larceny. * * * is a question we are not called upon to decide." So in our case the judge would not have invaded the province of the jury, but would have avoided the error into which he has fallen, had he told them that if they should find from the testimony there was either a premeditated intent on the part of the prisoner to kill, or that he killed while he was attempting to carry out a purpose to abduct they would be warranted in returning a verdict of guilty of mur-

der the first degree; but, if they were not satisfied as to the existence of either the premeditated purpose to kill or the intent to abduct, and they believed that he killed with a deadly weapon, then the law raised a presumption of guilt of murder in the second degree, and that presumption had not been rebutted, he would have avoided the error into which he has fallen. If a special verdict would be fatally defective because the jury, in the exercise of their exclusive right, failed to find the existence of the essential element of intent in abduction or the preconceived purpose in order to constitute the highest grade of homicide, then it would seem to follow inevitably that the judge has no more right to find the intent for them before than after they have considered and passed upon the testimony. It be true that whatever the intent is of the essence of the offense, and the jury fail in a special verdict to state specifically that there was a criminal intent, the judge is not at liberty to supply the defect before stating the conclusion of the law, surely, when the jury retain the right to state the verdict in the shape of a conclusion, he cannot do before what he could not do after,—assume that the facts proved a guilty intent.

My Brother FURCHES has cited cases exactly in point from the court of the state where the statute originated, and in which the opinions rest upon the fundamental principles to which I have adverted. I have ventured to discuss the question upon the reason of the thing as it would be presented if no authority could be adduced from aboard. We are not acting as arbitrators, nor as citizens susceptible to the influence of the public indignation naturally aroused by such conduct as is attributed to the prisoner, but as a court supposed to hold the scales of justice too high to be shaken in our purpose by even our own abhorrence of cruelty. To sanction the mistake of a *nisi prius* judge who may have been swept from his moorings by listening to testimony which could scarcely fail to excite disgust at least would probably be to endanger the safety of some other prisoner around whom a network of false testimony may be woven, and whose only safety may lie in the discrimination of an intelligent jury of the vicinity. If a trial judge has the right to draw inferences for the jury, the safe-

guard thrown around accused persons, as well as parties to civil actions, is destroyed. I concur fully in the conclusion of the court, and have deemed it wholly unnecessary to add anything to the clear and full discussion of authorities by Justice FURCHES.

CLARK, J. (dissenting).—The exact point presented in this case has been recently decided in *State v. Gilchrist*, 113 N.C. 673; 18 S. E. 319, construing the act of 1893 (chapter 85) "dividing the crime of murder into two degrees." In that case the judge charged in almost the very words used by the judge in this, telling the jury that the prisoner, upon the evidence, was "guilty of murder in the first degree or of nothing." This was approved by the unanimous opinion of this court, and there is nothing in the present case which calls upon the court so soon to ignore its own decisions to follow the unsettled construction of the Pennsylvania courts upon a somewhat different statute. To the same effect are three decisions upon chapter 434, Acts 1889, dividing the crime of burglary into two degrees, in which the identical words are used as to the duty of the jury, as in the act dividing the crime of murder, and are construed as in *State v. Gilchrist*, *supra*. In *State v. Fleming*, 107 N. C. 905; 12 S. E. 131 (on page 909, 107 N. C., and page 131, 12 S. E.), the court holds that this does not give the jury the discretion to convict of the second degree, but the conviction should be in the first or second degree, according to the evidence; and the court should instruct what degree of burglary a given state of facts would be, if found to be true. This was cited and approved in *State v. McKnight*, 111 N. C. 690; 16 S. E. 319, in which it is held (opinion by Shepherd, C. J.) that the court did not err in refusing to charge that the defendant could be convicted of a lesser grade of burglary than in the first degree if they believed the evidence. In the charge there approved the court instructed the jury that, if certain evidence was believed, they should convict of burglary in the first degree, and, if it was not believed, not to convict of burglary at all. The same authority was cited again in *State v. Alston*, 113 N. C. 666; 18 S. E. 692, the court holding that the judge properly should have instructed the jury as was done in the present case. The court below therefore followed the uniform decisions

of this court upon an exactly similar statute, which ruling is sustained by the almost uniform decisions of the courts of other states upon similar statutes. There are repeated decisions in our court, not resting upon the presumption from the use of a deadly weapon, approving a charge, "If the jury believe the evidence the defendant is guilty of murder." Among these it is sufficient to refer to *State v. Baker*, 63 N. C. 276. His honor did not instruct the jury to convict, but simply told them that this state of facts, if found beyond a reasonable doubt to be true, would constitute murder in the first degree; just as he would have gone on, if there had been conflicting evidence, to instruct them that another state of facts, if believed, would have constituted murder in the second degree, and still another, manslaughter. There being but one state of facts in evidence, the court, after "explaining to the jury the degrees of murder, and that the credibility of the witnesses was peculiarly for the jury, and that in a case of this importance the jury should exercise great care, and weigh the evidence well, and be fully convinced of its truth before conviction," instructed the jury that this state of facts, if fully believed, would make the prisoner guilty of murder in the first degree, and, if not believed, the prisoner should be acquitted. The jury found the uncontradicted testimony to be true. If these facts constitute murder in the first degree, his honor committed no error in telling the jury so. If these facts do not constitute murder in the first degree, then his honor erred in instructing that they did. There is nothing else in the case.

Now, what is the undisputed and uncontradicted state of facts which the jury have passed upon by their verdict, and found to be the truth. Succinctly stated, it is this: The deceased, according to her mother, about ten to twelve years old, and, according to the physician, apparently fourteen, being "well developed," was sister to the prisoner's wife, and been living with them in Virginia. For some reason she returned home to her parents about last Christmas, and in February last the prisoner appeared at their house, and spent Sunday night. He wished the little girl to fondle his head, and on her refusal struck at her with a razor, and swore he would kill her. He was armed with a pistol, razor, and knife, and, firing off his pistol, swore that the

girl should go back to Virginia with him, or he would kill her. On Monday the prisoner stated to the girl's brother, in the woods, that he "intended to make Tessie [the deceased] go off with him, or it would go hard with her." On Tuesday the prisoner came back with his pistol, asked if the girl had returned. When she came up she attempted to run, and the prisoner followed her, grabbed her by the arm, and pushed her at arm's length in front of him, pulling out his pistol, and trying to carry her off. She appealed to her mother, weeping and beseeching her not to let the prisoner carry her off. The mother called the child's father to assist her in preventing the abduction. The father came from the field to rescue his child, armed with some rocks. The prisoner advanced on him with his drawn pistol, and the father took shelter behind a house. The prisoner thereupon again grabbed Tessie, and in spite of her crying and begging her father, mother, and brother to save her, pushed her along the road in front of him. The mother then commenced shrieking for a neighbor to come to her help, and the prisoner thereupon put his pistol to the child's back, fired, and ran off into the woods. She died therefrom two days later. The prisoner was not drinking. Such are the facts in this case, which were uncontradicted, and which the jury, under the caution given them by the accomplished judge who presided at this trial, have found to be true beyond all reasonable doubt. The jury having found the evidence to be true, we cannot throw doubt upon their finding. In this state of facts there is no element of murder in the second degree or of manslaughter which the judge could have submitted to the jury. The sole question was whether the facts were true or not. If true, a more unprovoked, cold-blooded murder was never committed within the bounds of this state. No legislature in North Carolina has ever passed an act which they could have intended should be construed as directing that so brutal a slaying of a helpless victim, while calling upon her kindred for help, should be called other than murder in the first degree. The last act on the subject (1893) provides: "The willful, deliberate and premeditated killing, or any killing which shall be committed in the perpetration of or in the attempt to perpetrate * * * a felony shall be deemed murder in the first degree." It is not

necessary to dwell upon the attorney general's second ground,—that the crime, having been committed in an attempt to commit abduction, which is a felony, was necessarily murder. That the prisoner was attempting to take the young girl from the care of her parents for purposes of lust is an inference which the jury might have been justified in drawing, but that the killing was, in the language of the statute, "wilful, deliberate and premeditated," is not an inference, but the necessary consequence, the very fact itself, which the jury found when they found the above state of facts to be true. In *State v. Norwood*, 115 N. C. 789; 20 S. E. 712 (since the act of 1893), the presiding judge refused, though requested by written prayers, to submit the phases of murder in the second degree or manslaughter (and they were not even prayed for in the present case), but told the jury that "premeditation did not require any considerable length of time; and if the prisoner, after conceiving the purpose to kill, immediately carried the resolve into execution [there being in that case, as in this, no provocation or heat of passion], malice would be presumed, and the premeditation contemplated by the statute would be shown." This court, sustaining the charge, said: "If it is shown that the prisoner deliberately determined to take the child's life by putting pins into its mouth, it is immaterial how soon, after resolving to do so, she carried her purpose into execution." In *State v. McCormac*, 116 N. C. 1033; 21 S. E. 693, the court again say: "It is not essential that the prosecution, in order to show *prima facie* premeditation and deliberation on the part of a prisoner charged with murder in the first degree, should offer testimony tending to prove a preconceived purpose to kill, formed at a time anterior to the meeting when it was carried into execution." A *prima facie* case is one which is conclusive unless evidence, from which a different conclusion may be reasonably drawn, appears somewhere in the case. Aside from the previous threats shown in the present case, the prisoner placed his pistol at the back of a defenseless girl, who was offering no resistance, save her cries for help. There was nothing to show that he acted thus to defend himself from her, nor as in the heat of a contest with an opponent under circumstances which could mitigate the offense to manslaughter or murder in the second

degree. He placed his pistol at her back, blew a hole in her, and ran off into the woods. This is not the presumption arising from the use of a deadly weapon, but here the naked facts themselves, unless added to, are susceptible of no other interpretation, when found to be true, than that the killing was "willful and deliberate," and hence murder in the first degree. If the jury found these facts to be true (as they did), they would not have been warranted in justice in finding the prisoner guilty of murder in the second degree or or manslaughter. As they could not justly have done so, his honor committed no error in not submitting those phases to them, and in telling them that if this state of facts was, beyond reasonable doubt, the truth of the occurrence, it constituted murder in the first degree.

There are decisions under the Pennsylvania statute which directly sustain the charge of the court below in this case. *Republica v. Mulatto Bob*, 4 Dall. 145; *Com. v. Smith*, 2 Wheeler, Cr. Cas. 79. And there is a Pennsylvania case apparently conflicting with these cases, but which can be readily distinguished. It would be a useless labor, however, to consider and reconcile Pennsylvania decisions,—which are not always reconcilable,—and that task can best be left to the court that made them. But one thing is clear beyond all technical and skillfully drawn distinctions, and that is, by our law the willful, deliberate killing of a human being is still murder in the first degree; and, taking the facts of this case as a jury have found them, the prisoner willfully, deliberately, without provocation or legal cause to excite his anger against her, placed his pistol at the back of a defenseless girl, whom he was trying to carry away from her home, against her cries for help, and the efforts of her father to save her, and the shrieks of her mother, and in cold blood shot her to death. This is still murder in North Carolina, and of the kind for which the perpetrators can be hung. These facts can admit of but one inference, and, that being so, his honor committed no error in telling the jury, if they found beyond all reasonable doubt that such were the facts concerning the killing, they should find the prisoner guilty of murder in the first degree, and no lesser offense.

MONTGOMERY, J. (dissenting). The crime of murder, by the act of 1893 (chapter 85), is divided into two degrees. Section 1 provides that: "All murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony shall be deemed to be murder in the first degree and shall be punished with death." Section 2 makes all other kinds of murder murder in the second degree, punishable by imprisonment. Section 3 declares that: "Nothing herein contained shall be construed to require any alteration or modification of the existing form of indictment for murder, but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree." In North Carolina, previous to the enactment of that statute, if a person killed another without any, or upon slight, provocation, as for offensive words, for instance, or with an excess of violence out of all proportion to the provocation, the law placed him on the same plane as it did the murderer who had deliberately planned and executed a killing from a long-cherished feeling of revenge, or by waylaying for the purpose of robbery. The rule was that, where the killing was proved, malice was always presumed; and where there was malice the law declared the homicide to be murder, and the punishment death. It was to do away with this forced and artificial conclusion which the law drew of the equal guilt of the man who had committed a homicide on a sudden heat without malice in fact, even though done without provocation, and of the man who had deliberately, willfully, and premeditatedly planned the killing for revenge or greed. The statute was enacted to afford a more rational rule for the trial and punishment of him who had committed a homicide on the impulse of the moment, and without malice in fact, and not to take from out the common-law rule a killing where, by undisputed testimony, it was proved to have been done under circumstances of threats and preparation and deliberation. It was not intended that it should be left to the jury to determine judicially the effect of such testimony, but that they should, as formally, pass upon its credibility, leaving it

to the court to instruct them as to its legal effect. If, in a case where the crime has been committed since the enactment of the statute, the state should show that the killing was sudden, and without provocation, and no more appears, the accused cannot be convicted, as under the old law, of murder in the first degree, but only of murder in the second degree, though a deadly weapon was used. But, if the testimony is undisputed and uncontradicted, and goes to show the killing by any of the means named in section 1 of the act, the rules of the common law ought to apply. The judge ought to instruct the jury that they are to consider thoroughly the credibility of the testimony, and that, if they believe it to be true beyond a reasonable doubt, they should render a verdict of guilty in the first degree. In cases like the one before the court the language of the act, which reads, "but the jury before whom the offender is tried shall determine in their verdict whether the crime is murder in the first or second degree," ought not, in my opinion, to be construed to mean more than that the jury shall, under proper instructions from the court upon the character of the testimony, consider it simply in the light of its credibility, and return their verdict as they would do in all other cases where the testimony was undisputed, and where they had received instructions from the court as to the legal bearing and effect of such undisputed testimony, should they find it to be true. This construction is strengthened when it is noticed that the words which declare the duty and power of the jury under this statute stand in direct connection with, and in the same sentence with, that part which treats of the nature and form of the bill of indictment.

Chapter 434 of the Acts of 1889 divides burglary into two degrees, first and second,—the first punishable with death, the second by imprisonment; and section 3 of that act reads as follows: "That when the crime charged in the bill of indictment is burglary in the first degree the jury may render a verdict of guilty of burglary in the second degree if they deem it proper to do so." The last-named section seems upon its face to give the jury broader latitude in making up their verdict than is conferred upon them in the act dividing murder into two degrees. This court has passed upon the burglary statute several times, and I

believe it has sustained me in the view I have expressed in this opinion. In *State v. Fleming*, 107 N. C. 905 ; 12 S. E. 131, the defendant was indicted for burglary. On the trial the court charged the jury that certain facts testified to amounted in law to a sufficient "breaking" if they believed the evidence; and this court sustained the charge. It is true, the bill of indictment was, in form, under the common law; but this court said further in that case: "We do not understand the provision of the statute that on an indictment for burglary in the first degree 'the jury can return a verdict of burglary in the second degree if they deem it proper so to do' to make such verdict independent of all evidence. The jury are sworn to find the truth of the charge, and the statute does not give them a discretion against the obligation of their oaths." In *State v. McKnight*, 111 N. C. 690 ; 16 S. E. 319, an indictment under the statute of 1889 for burglary in first degree, the house broken into was an inhabited dwelling house, and the accused admitted that he had broken into and taken money therefrom. The counsel for the defendant asked the court to instruct the jury that they might convict for a lesser offense than that charged in the bill of indictment, as provided in section 906 of the Code. The instruction was refused and this court said, in substance, that there was no error in the refusal, for the only question to be determined by the jury was whether it was done in the nighttime; the prisoner having admitted the breaking and entering and the taking of the money. If it was done in the nighttime, it was burglary in the first degree. In *State v. Alston*, 113 N. C. 666 ; 18 S. E. 692, the defendant was indicted for burglary. The charge of his honor to the jury was that, "although all the evidence was that the family was present in the house" at the time the accused was charged to have broken into it, they might find him guilty of burglary in the first degree or guilty in the second degree. This court said in reference to that charge: "The court should have charged the jury that if they believed from the evidence that the family was present in the house at the time of the felonious entry as charged, they should convict the defendant of burglary in the first degree. Under such circumstances the jury are not vested with the dis-

cretionary power to convict of burglary in the second degree. The power to commute punishment does not reside with the jury." The court further said, in substance, that it would have been improper for his honor to have instructed the jury that all the evidence was that the family was in the house at the time of the felonious entry, and that they should find the defendant guilty of burglary in the first degree, that it was only where the jury believed that the family was in the house to be a fact that they could have returned such a verdict. The jury must first pass upon the credibility of the evidence. In the case now before the court, the accused, on his trial, offered no testimony. That which was offered by the state was undisputed and consistent. The substance of it was that the deceased, who the mother said was about ten or twelve years old, and the physician who attended her said was about fourteen, and well developed, was a sister of prisoner's wife, and had lived with them in Virginia a short while—for a part of the year 1894,—returning to her home in Yadkin county about Christmas of that year. On Sunday night before the homicide, which occurred the following Tuesday (16th February, 1895), the accused arrived at the home of the deceased, from Virginia, armed with a pistol, razor, and a knife. He insisted that the deceased should fondle his head, and upon her refusal, slashed at her with his razor, and swore he would kill her. He then fired off his pistol, and swore that the deceased had to go to Virginia with him, or he would kill her. She said she did not intend to go. He left that night, but returned on the next day,—Monday,—and told her brother that "he intended to make Tessie (the deceased) go off with him, or it would go hard with her." On Tuesday he returned, and, seeing the deceased, he drew his pistol. She tried to escape from him; and ran to her mother, but he "grabbed" her and pushed her up the road. The mother called the father, at work in a field near by, who, upon his coming near, saw the situation, and began to gather stones, which the accused noticing, he leveled the pistol at the father, and, still holding the child, drove him behind a house on the roadside. The mother crying for the help of neighbors, and the girl begging for help from her brother and father, and imploring them not to let the accused carry her off, the prisoner placed his pistol immediately

upon the back of the deceased, and fired it, inflicting a wound from which she died two days afterwards. He fled into the woods after he had shot her. He was sober. There was no exception to the testimony, and, as stated before, he offered none. What was there to submit to the jury except the credibility of the testimony? The facts, if believed, constituted in law premeditation and malice. The case was well argued by the attorney general, and by Mr. Holton for the prisoner. The decisions of the court of Pennsylvania were relied upon by both to help sustain their several views. The Pennsylvania statute is like ours, and was the first of the kind enacted in the States. That court, in the earlier cases on that statute, put the construction on it which I contend for here. Later decisions of that court have reversed the former ones, and this court, in the opinion filed in this case, has followed the later Pennsylvania cases, without, I think, giving due weight to our own decided cases in reference to statutes similar in nature to the one under consideration. His honor instructed the jury, after reciting all the evidence, that if they believed it to be true beyond a reasonable doubt, the prisoner was guilty of murder in the first degree. This was, in substance, the charge which the court gave in *State v. Gilchrist*, 113 N. C. 673; 18 S. E. 319, and which on appeal was approved. I think there was no error in the charge.

Supreme Court of Illinois.

(November 25, 1895.)

ROBINSON v. PEOPLE.

EVIDENCE—CONFESSION.

A confession can never be received in evidence when the prisoner has been influenced by any threat or promises. So held, where a person accused of crime was promised by the state's attorney that, if he would

make a written statement of the facts, it should not be used against him, but, after he did so, the state's attorney was not satisfied with the statement and asked him to come to the latter's office, and make an oral statement, which the accused did under the belief that it would not be used against him.

Appeal from a judgment convicting defendant of burglary.

Grier & Stewart, for plaintiff in error.

M. T. Moloney, Atty. Gen., for the People.

BAKER, J.—In January, 1894, the barn of one John Gabby was burglarized, and certain harness and other property stolen therefrom. At the May term, 1895, of the Warren circuit court, William Robinson, the plaintiff in error, was indicted for the offense, and a jury trial resulted in his conviction, and he was sentenced to the penitentiary for the term of one year. The only incriminating testimony against him was a certain alleged confession made by him to the state's attorney of the county, and testified to by A. B. Holliday, a police officer; and this testimony was admitted in evidence over his objections and exceptions. The confession in question was obtained under, substantially these circumstances: About the last of April or first of May, 1895, it was suspected by the state's attorney, by said Holliday, and by Pershin, a deputy sheriff, that plaintiff in error and certain other persons had committed the crime; and they procured the arrest of plaintiff in error, who was then sick in bed, and had him placed in the custody of an officer. The state's attorney induced Samuel Robinson, a brother of plaintiff in error, to procure from plaintiff in error a written statement of the supposed facts of the transaction, promising him that plaintiff in error should not be prosecuted if he would tell everything he knew about the matter, and that he would not use such written statement in evidence against him. These promises were communicated by Samuel to his brother. Samuel then took down in writing the statement made by plaintiff in error, and there was placed at the head of the statement a provision that it was not to be used in evidence. The state's attorney was not satisfied with this written statement, and expressed a wish to have a personal interview with plaintiff in

error, so that he "could draw out what he was after." Samuel arranged for the interview, telling his brother that what he told the state's attorney "would be with the understanding that it should not be brought up against him in court." The state's attorney called Holliday in to hear the conversation with the prisoner; and it is the conversation that then took place that was introduced in evidence. It seem that, upon the prisoner's being taken to the office of the state's attorney, he immediately began making his statement, and that, after he had finished making it, the state's attorney told him that if he would go before the grand jury, and testify to what he had just said, and tell the same story on the trial of the case, he should not be punished; and the prisoner agreed to do so, but afterwards refused to testify against the others charged with the offense.

The matter of this latter arrangement is of no importance in the decision of the question now before us. The confession or admission that was introduced in evidence had been fully made and completed before the making of such arrangement, and, as matter of course, was not induced thereby; and there is no occasion for settling the conflict between the testimony of Samuel Robinson and the state's attorney as to inducements being held out, and promises made, in the coversation that occurred between them after the written statement had been obtained that led up to the personal interview between the state's attorney and the prisoner. The latter testified: "I had a conversation with the state's attorney and Mr. Holliday at the state's attorney's office. I was told to go in there, and make a statement, and anything I said would not be brought in evidence against me. That is the way I came to make it. My brother Samuel told me that." As we understand the testimony of the state's attorney, he does not deny the inducements alleged to have been held out, and the promises alleged to have been made, prior to the time the written statement was procured, but that he merely denies having made the similar promises that Samuel Robinson testifies were made subsequent thereto, and prior to the personal interview between the state's attorney and the prisoner. The former constituted Samuel Robinson his agent to communicate the inducements and promises to the prisoner, and they were so communicated. The written state-

ment was thereby induced. The promises and inducements were not afterwards withdrawn. The surrounding circumstances and the direct evidence clearly indicate that the subsequent oral statement was made by the prisoner with the understanding that the inducements offered and promises made in the first instance applied as well to the oral as to the prior written statement; and the evidence shows that the police officer and the deputy sheriff so understood it. Holliday testifies: "I understood that Robinson was to tell his story, and he was to be indemnified; was not to be prosecuted if he would tell his story. That was the fact as I understood it. I understood he was telling what he told under that sort of a promise, but nothing was said. I understood he was telling under a promise of that kind, because I had talked with the state's attorney. All I know about the arrangement is what I was told by the state's attorney. He told me about the previous arrangement." Pershin testifies: "The understanding I had was that any evidence he would give would not be used in court. Had that understanding at time written statement was shown me. The substance of what the state's attorney said to me was that any statement he should make would not be used as evidence against him in court. I don't know that it had particular reference to the written statement. The talk with the state's attorney was at different times."

The rule is that a confession can never be received in evidence when the prisoner has been influenced by any threat or promises, for the reason that the law cannot measure the force of the influence used, or decide upon its effect on the mind of the prisoner, and therefore excludes it if any degree of influence has been exerted by any person having authority over the charge against the prisoner or over his person. *Austin v. People*, 51 Ill. 236; 1 Greenl. Ev. sections 219, 222; *Starkie*, Ev. 36. *Bartley v. People*, 156 Ill. 234, 40 N. E. 831, does not establish any different rule. We there said that the confession becomes incompetent wherever any degree of influence has been exerted, because the law presumes that it was prompted by that influence. That case is plainly distinguishable from this. There were there facts to show that the confession was voluntarily made. There the defendant had not been arrested, or even publicly accused of the crime;

and he of his own accord sought the opportunity to talk with the prosecuting witness in regard to the crime, and with the manifest intention of making a confession, and promising to return the stolen money. Here, on the other hand, the confession and the implication of others in the commission of the crime were clearly induced by hope and the promises that the prosecution against him should be dropped. It was error to admit the confession in evidence. For that error the judgment is reversed. The cause is remanded. Reversed and remanded.

NOTE ON CONFESSIONS.

WHAT ARE.—A voluntary confession is one proceeding from the spontaneous suggestion of the party's own mind, free from the influence of any extraneous disturbing cause. *People v. McMahon*, 15 N. Y. 384; *People v. Chapleau*, ante.

A statement by accused that he knows who committed a crime, and that he was present when another person (naming him) committed it, is not a confession. *Bell v. State* (Ga.), 19 S. E. 244.

Statements made by defendants, indicted together for murder, in which each accused the other of the crime without inculpatting himself, and which did not refer to anything done in common as charged, are not admissible as confessions. *State v. Carson* (S. C.), 15 S. E. 588.

On a trial for arson, declarations by accused designed and tending to explain his possession of some of the goods which were in burned building immediately preceding the fire, and his knowledge touching the whereabouts and the possession of other parcels of the goods, were in their inculpatory tendency criminating admissions, as distinguished from confessions. *Fletcher v. State* (Ga.), 17 S. E. 100; see, also, *State v. Carson*, 36 S. C. 524.

In a prosecution for tearing up a railroad track so as to throw off the cars, defendant's admissions that he was with one who broke open a tool house, took out tools, and therewith wrecked the train, in order to rob the dead, are a confession, to be corroborated by proof that the crime had been committed, and joined in by defendant. *Collins v. Commonwealth* (Ky.), 26 S. W. 1.

BEFORE CODE.—The following propositions were, prior to the adoption of the Code of Criminal Procedure, well settled by law in this state of New York: First. All confessions material to the issue, voluntarily made by a part, whether oral or written, and however authenticated, were admissible as evidence against him

on a trial for a criminal offense. *People v. Wentz*, 37 N. Y. 303. Second. It was no objection to the admissibility of such confessions, that they had been taken under oath from a person attending before a coroner, in obedience to a subpoena, upon any inquiry conducted pursuant to law, into the causes of a homicide. *Hendrickson v. People*, 10 N. Y. 13. Third. That the confession or declaration sought to be given in evidence was in writing and purported to be sworn to, was no objection to its admissibility, unless it also appeared that it was taken before a magistrate upon a judicial investigation against the person accused of the commission of the crime. *People v. McGloin*, 91 N. Y. 247; 1 N. Y. Cr. 154.

The test of admissibility of the statements of a party accused of the commission of the crime, whether made in the course of judicial proceedings or not, is whether they were voluntary. *People v. Chapleau*, 30 St. Rep. 989; 121 N. Y. 274. This can be determined by their nature and the circumstances under which made. *Id.* If in all respects, and however viewed, they could only have been the voluntary and uninfluenced statements of the individual, no principle of law warrants their exclusion and the Code expressly authorizes their being given in evidence upon the trial. *Id.*

THREATS, ETC.—The fear, which is required to exclude the confessions, must be a fear produced by threats, and the hope must be based upon the stipulation of the district attorney promising immunity from prosecution for the crime confessed. *People v. Mondon*, 2 St. Rep. 713; 103 N. Y. 219; 4 N. Y. Cr. 559.

Where the state offers to prove a confession by defendant to the officer who conducted him to jail, and such officer testifies that no threats were made to induce the confession, defendant may show that the confession was made under the influence of fear, caused by threats.

Confessions of the accused in a criminal prosecution are inadmissible, where there is reasonable ground for the presumption that they were extorted by threats, or induced by means of promises. *May v. State* (Neb.), 56 N. W. 804.

Where a confession extorted by threats of violence is admitted, but there is also evidence of a distinct confession, made by defendant at other times and to other persons, when he was not influenced by any promise, advice, or threat, a verdict of guilty will not be set aside. *Wigginton v. Commonwealth* (Ky.), 17 S. W. 634.

Error in admitting a confession, incompetent because made under duress, is not cured by a subsequent exclusion thereof. *State v. Shepard* (Wis.), 59 N. W. 449.

WHEN QUESTIONS OF LAW.—Where there is no conflict in the evidence as to the circumstances under which the statements were made, their admissibility should be decided by the court and not be left to the jury. *Willett v. People*, 27 Hun, 469.

Where there is no conflict in the evidence as to what occurred at the time the confession was made, or as to the conversation held with the defendant, it is a question of law as to whether the confession is or is not receivable. *People v. Druse*, 3 St. Rep. 617; 5 N. Y. Cr. 20; 1 Silv. (Ct. App.), 186; *Willett v. People*, 27 Hun, 469; *People v. Mondon*, 38 Id. 188; 4 N. Y. Cr. 112; *Murphy v. People*, 63 N. Y. 591.

The sufficiency of the evidence to show the competency of a confession is for the court. *Brady v. United States*, 1 App. D. C. 246.

The admissibility of confessions is for the court and their credibility for the jury. *Goodwin v. State (Ala.)*, 15 So. 571.

Where there is no conflict in the evidence as to the circumstances under which such statement was made, the question of admissibility should be decided by the court, and not left to the jury. *Id.* *Willett v. People*, 27 Hun, 469.

WHEN QUESTION OF FACT.—But, where there is a conflict of testimony, or room for doubt, the court should submit the question to the jury, with instructions that, if they are satisfied that the confession was procured by the prohibited inducements, they should disregard and reject it. *People v. Mackinder*, ante; *People v. Kurtz*, 3 St. Rep. 315; 42 Hun, 335; *People v. Fox*, 31 St. Rep. 570; 121 N. Y. 449; *People v. Cassidy*, 44 St. Rep. 869; 133 N. Y. 612.

Where the defendant testified that the confession was made by reason of threats, the person to whom it was made, testified that no threats were employed, the charge of the judge correctly stated the rules of law relating to confessions which should govern the deliberations of the jury, and the jury found the defendant guilty, the appellate court must assume that the jury found the confessions to have been voluntarily made. *People v. Bishop*, 53 St. Rep. 60; 69 Hun, 105.

Where the evidence as to whether defendant was cautioned by the officer before making a confession is conflicting, the jury should be instructed to disregard the same if they believe the caution was not given. *Rains v. State (Tex. Cr. App.)*, 26 S. W. 398.

The jury could accept statements that seemed to deserve credit, and from such statements, and the other evidence, find facts sufficient to warrant a conviction. *State v. Dooley (Iowa)*, 57 N. W. 414

Evidence of confessions to various persons, made by defendant voluntarily, and not under any threats, duress, or promises, is competent, and the weight of such evidence is for the jury. *People v. Taylor* (Mich.), 53 N. W. 777; 93 Mich. 638.

Under Code, section 1146, it is not necessary that the magistrate shall use the precise words of the statute in giving the prescribed caution, but it is sufficient if there be a substantial compliance with the requirements of the law. *State v. Rogers* (N. C.), 17 S. E. 297.

PRELIMINARY EXAMINATION.—Whether the preliminary inquiry to determine whether a confession was voluntary shall be conducted in the presence of the jury, or not, rests in the sound discretion of the trial judge. *Lefevre v. State* (Ohio Sup.), 35 N. E. 52; 50 Ohio St. 584.

Upon the preliminary inquiry had before the judge to determine whether a confession was voluntary, defendant may introduce pertinent evidence in addition to that which results from the preliminary examination and cross-examination of the witness produced to testify to the confession. *Lefevre v. State*, 35 N. E. 52; 50 Ohio St. 584.

While it is the better practice to show by preliminary evidence that confessions intended to be proved were made freely and voluntarily, yet, where such evidence is omitted until after the confessions are received, it may then be introduced. *Smith v. State*, 15 S. E. 675; 88 Ga. 627.

BEFORE CORONER.—The statement of a prisoner before the coroner and jury, if made at his own election and request, and without the operation of the influences of fear, produced by threats, or of hope, under a stipulation that he would not be prosecuted, is admissible, under the provisions of section 395 of New York Code of Criminal Procedure, on a trial against him to prove the homicide. *People v. Chapleau*, 30 St. Rep. 989; 121 N. Y. 272.

Defendant's testimony at an inquest will be presumed to be voluntary, in the absence of proof to the contrary. *State v. David* (Mo. Sup.), 33 S. W. 28.

A mere consciousness of being suspected of a crime does not so disqualify a person that his testimony, in other respects freely and voluntarily given, before the coroner, cannot be used against him on his trial on a charge, subsequently made, of such crime. *Teachout v. People*, 41 N. Y. 7.

When a coroner's inquest is held before it has been ascertained that a crime has been committed, or before any person has been arrested charged with a crime, the testimony of a witness, who is called and sworn before such jury, may be used against him on his trial, in case he shall afterwards be charged with the crime.

People v. Mondon, 2 St. Rep. 713; 103 N. Y. 221; 4 N. Y. Cr. 559. The mere fact that, at the time of his examination, he was aware that a crime was suspected, and that he was suspected of being the criminal, will not prevent his being regarded as a mere witness, whose testimony may be afterwards given in evidence against himself. *Id.*

Statements made by the defendant, as a witness at the coroner's inquest, before the witness has been charged with the murder, and before it was ascertained that a murder had been committed, are admissible in evidence against him upon a trial for murder. *Hendrickson v. People*, 10 N. Y. 13.

But where it appears, at the time of a witness' examination before a coroner's jury, that a crime has been committed, and that he is in custody as the supposed criminal, he is not regarded merely as a witness, but as an accused party, to be treated in the same manner as though brought before a committing magistrate, and his examination, if not taken in conformity with the provisions of sections 196 to 200 inclusive of New York Code of Criminal Procedure, cannot be used against him on his trial for the offense. *People v. Mondon*, 2 St. Rep. 713; 103 N. Y. 221; 4 N. Y. Cr. 559.

From the time that the prisoner occupies the position, before the coroner's inquest, of a person accused of crime, his situation is similar to that of such a person before an examining magistrate. *Id.*

Where a constable arrested, without warrant, the prisoner on suspicion of being the murderer of his wife, and took him before the coroner, who was holding an inquest upon her body, and who swore and examined him as a witness, such evidence is not admissible on his trial for murder. *People v. McMahon*, 15 N. Y. 384.

It appeared that defendant made a written statement to an officer after an inquest, and the court, before the state offered it in evidence refused to allow defendant to introduce it, or to interrogate a witness in relation to it, but it was read by the state in rebuttal, and defendant exercised a right to testify all about it. Held, that defendant was not deprived of any right with respect to such statement. *State v. Fitzgerald* (Mo. Sup.), 32 S. W. 1113.

DISCOVERY.—Under the Texas statute, a confession which results in a discovery of the fruits of the crime is admissible in evidence, though inducements were held out to defendant, if the discovery was made "by reason of the confession." *Rains v. State* (Tex. Cr. App.), 26 S. W. 398.

A confession by accused, though he was not cautioned, is ad-

missible to impeach his credibility as a witness, though it did not result in a discovery of the fruits of the crime. *Raines v. State* (Tex. Cr. App.), 26 S. W. 398.

The statement, made by one while in jail on the charge of burglary, that a certain article with which the building was broken into, and a certain article taken therefrom, would be found in a certain place under a building, is, in connection with evidence that they were so found, admissible against him under Code Crim. Proc., art. 750, making the confession of one in confinement admissible, where, in connection therewith, he made statements of facts, that are found to be true, which conduce to establish his guilt. *Davis v. State* (Tex. Cr. App.), 23 S. W. 687.

Confession of one accused of receiving stolen goods, although made when under arrest without being cautioned, if accompanied by a statement of facts and circumstances conducing to support his guilt, and afterwards found to be true, and which led to the finding of the stolen property, are admissible in evidence, under Code Crim. Proc., art. 750, which expressly excepts confessions made under such circumstances from the general rule. *Sands v. State* (Tex. Ap.), 18 S. W. 86.

A confession not resulting in a discovery of the fruits of the crime, and which was obtained from defendant by holding out inducements to him, is not admissible for any purpose. *Rains v. State* (Tex. Cr. App.), 26 S. W. 398.

PROOF.—Where a prisoner makes a confession to a person who afterwards procures another to reduce it to writing, the latter is competent to prove that it was freely and voluntarily made; and the person to whom it was first made need not be put upon the stand at all. *State v. Howard* (S. C.), 14 S. E. 481.

When a written confession of guilt is offered against a person on trial for a criminal offense, and he objects to the same and offers to prove to the court that it was procured from him by threats or promises, or under such circumstances as would render it incompetent as evidence, it is error to receive the paper without first hearing the proof offered, and deciding upon the competency of the confession as evidence against the party making it. *People v. Fox*, 31 St. Rep. 570; 121 N. Y. 453.

Where a witness to whom confessions were made, and several persons present, testified that they were voluntary and the accused testified that they were induced by threats, there was no error in admitting them in evidence, under instructions that they should be disregarded if so obtained. 14 N. Y. S. 349; affirmed; *People v. Cassidy* (N. Y. App.), 30 N. E. 1003; 133 N. Y. 612.

WHEN ADMISSIBLE.—In order that a confession may be admissible in evidence, the onus lies upon the prosecution to prove

that it was free and voluntary. *Reg v. Thompson*, 5 Reports, 392; (1893), 2 Q. B. 12.

A confession, not made under the influence of fear produced by threats, nor upon any promise of immunity from prosecution, is admissible. *People v. Druse*, 3 St. Rep. 617; 103 N. Y. 656; 5 N. Y. Cr. 27; 1 Silv. (Ct. App.), 186.

A declaration or statement, made before the accused was conscious of being charged with, or suspected of, the crime, is admissible in all cases, whether made under, or without oath, upon a judicial proceeding or otherwise. *People v. McMahon*, 15 N. Y. 384.

Where the evidence does not disclose any threats, nor authorize an inference that the confession was made under the influence of fear, the statement, though sworn to by the accused, is in no respects compulsory, and is admissible in evidence under section 395 of New York Code of Criminal Procedure. *People v. McGloin*, 91 N. Y. 241; 1 N. Y. Cr. 154; 12 Abb. N. C. 172; 16 W. Dig. 255.

The accused need not be told, on his preliminary examination, that he need not testify unless he choose to do so, to render his testimony voluntarily given admissible against him. *Dill v. State* (Tex. Cr. App.), 33 S. W. 126.

Code Proc., section 1308, provides that a confession under inducement is admissible. *State v. Hopkins* (Wash.), 42 P. 627.

Under Code Proc., section 1308, making a confession by a defendant in a criminal case, made under inducements, admissible against him, except when made under influence of fear produced by threats, a voluntary confession under inducements by one of two defendants charged jointly with larceny, is admissible against both. *State v. Coss* (Wash.), 42 P. 127.

A voluntary commission before the grand jury, made after defendant was cautioned, is admissible when, in the judgment of the court, it is material to the due administration of justice. *Thomas v. State* (Tex. Cr. App.), 32 S. W. 771.

Voluntary testimony given by one to escape liability in a civil action against him for embezzlement, is admissible in a criminal prosecution therefor. *State v. Hopkins* (Wash.), 42 P. 627.

A voluntary confession of murder is not admissible, because made to free defendant's sister, then under arrest for the crime, from suspicion, especially where defendant testifies in self-defense to every fact contained in the confession, and the sister testifies that he acknowledged to her substantially the same facts immediately after the killing. *People v. Smalling* (Cal.), 29 P. 421.

Where it appears the confessions were made voluntarily, and without threat or inducement, the fact that a defendant makes

confessions in answer to questions by the officer having him in custody does not render them inadmissible. *McQueen v. State* (Ala.), 10 So. 433.

Where the defendant, while under examination by a magistrate on the charge of burglary, after being cautioned, voluntarily admits his guilt, in a statement that is reduced to writing by the magistrate and signed by defendant, such written statement is admissible against him as a confession, even though he was improperly required to be sworn on signing it, and even though the statement was not properly authenticated by the magistrate. *Salas v. State* (Tex. Crim. App.), 21 S. W.; 44; 31 Tex. Crim. R. 485.

Where defendant was properly warned of the effect of making a voluntary statement at the time of his examination, the fact that he expressed a desire to waive examination would not affect the admissibility of the evidence, nor operate as a reason for its exclusion. *Shaw v. State* (Tex. Cr. App.), 22 S. W. 588.

Where a prisoner signs the confession which has been written for him by another, he waives any objection to it as evidence, since by adopting the language he makes it his own. *Commonwealth v. Coy* (Mass.), 32 N. E. 4.

Statements of the accused, when made to the trial judge freely and voluntarily, are admissible in evidence. *State v. Chambers* (La.), 11 So. 944; 45 La. Ann. 36.

The confession of one accused of crime, and the fact that he made desperate efforts to escape arrest, are competent and convincing. *State v. Moore* (Mo. Sup.), 22 S.W. 1086.

Where an inducement to make a statement is held out to the prisoner by a person in authority, the prosecution must show clearly that the inducement has been removed before the confession is made. *Reg. v. Thompson*, 5 Reports, 392; (1893) 2 Q. B. 12.

Defendant's intoxication at the time of making a confession, though tending to affect the weight of the latter, is not ground for its exclusion. *White v. State* (Tex. Cr. App.), 25 S.W. 784; 32 Tex. Cr. R. 625.

Code Crim. Proc. art. 314, provides that the magistrate before whom an examination was taken shall certify and transmit the proceedings, including the voluntary statement of defendant, sealed up, to the proper court. Held, that the placing of defendant's voluntary statement, otherwise regular, in an envelope, was not essential to its admission as evidence. *Luera v. State* (Tex. Cr. App.), 32 S.W. 898.

Defendant, under threats by G. and a promise not to prosecute if he would return the money, confessed to burglary, to telling him that he would see B., who was also guilty, and return the

money if he was willing. Six hours later, at another place, B., voluntarily called G. aside, and confessed, and gave him the money, defendant standing by, and acknowledging that he was also guilty. The first confession by defendant was excluded and the subsequent admitted. Held no error. *Reeves v. State* (Tex. Cr. App.), 24 S.W. 518.

The admission of a confession as to having killed deceased, which was extorted by threats, is harmless, when he has never denied the act, but merely pleaded self-defense; and does not affect his detailed account of the matter, made after his arrest, when under no immediate apprehension. *State v. Coella* (Wash.) 36 P. 474; 8 Wash. 512.

On a prosecution for burglary, it appeared that a detective, who had a description of the stolen property, met a boy with a stolen coat, and on asking where he got it, was taken to defendant, who had on clothes stolen from the place burglarized. Without telling defendant that he was an officer, or that he intended to arrest him, he charged defendant with the burglary, and defendant confessed it. Held, that defendant was not under arrest when he made the confession, though the detective went to him with the purpose of arresting him if the boy identified him as the one who stole the coat, and that the confession was admissible. *Holmes v. State* (Tex. Cr. App.), 23 S.W. 687; 32 Tex. Cr. R. 361.

UNDER ARREST.—That the defendant was under arrest and that the confession was made to an officer, are circumstances which do not exclude it. *Cox v. People*, 80 N. Y. 500; *People v. Wentz*, 37 Id. 303.

A voluntary confession, otherwise admissible, is not rendered inadmissible by the fact that it was made by a person under arrest at the time it was made. *People v. Druse*, St. Rep. 617; 5 N. Y. Cr. 20; 1 Silv. (Ct App.), 186.

Where the defendant, while under arrest, made to the police inspector, in the presence of several persons, confessions, which they testified were voluntary, but which he testified, were made under the influence of fear, produced by threats, they are competent, in case, on submission, the jury find that they were voluntarily made. *People v. Cassidy*, 44 St. Rep. 870; 133 N. Y. 612; 4 Silv. (Ct. App.), 259.

A statement by one charged with theft, made while under arrest, but having been cautioned, may be offered in evidence as a confession. *Bell v. State* (Tex. Cr. App.), 20 S.W. 549; 31 Tex. Crim. R. 276.

The mere facts that defendant was under arrest for homicide, and that the officer who had him in charge was armed, are not sufficient to exclude a statement of defendant to the officer con-

cerning the homicide, and how it occurred, *Hornsby v. State* (Ala.), So. 522.

Where three citizens, having a gun, ride up to defendant on the morning after a homicide, and speak to him, but say or do nothing to indicate their intention not to allow him to escape, or to make him believe he is under arrest, his voluntary statements as to the killing are admissible against him. *Craig v. State* (Tex. App.), 18 S. W. 297.

Where one who has killed another surrenders himself to an officer, the fact that the latter told him that giving himself up was the best course he could pursue does not render inadmissible confessions then made to the officer. *Willis v. State* (Ga.), 19 S. E. 43.

Where, the day after the arrest and confession, defendant, on being arraigned, said he did not know anything about the stolen property, but, on being questioned by said officer, made certain admissions, they are admissible, since it will not be presumed that defendant, in making such admissions, was affected by the words of the officer spoken at the time of the arrest. *Commonwealth v. Myers* (Mass.) 36 N. E. 481; 160 Mass. 530.

The mere fact that an officer, in making the arrest, pointed a pistol at the accused, and advised him to give up, does not vitiate the latter's subsequent admissions, under circumstances showing that he had no fear of violence. *State v. De Graff*, 18 S. E. 507; 113 N. C. 688.

Under Code Proc., section 1308, it is proper to admit evidence of inculpatory declarations made by defendant to the officers having him in custody, if no threats were made, and the declarations were free and voluntary. *State v. Munson* (Wash.), 34 P. 932; 7 Wash. 239.

A confession is admissible, where the district attorney stated to defendant that, if he made any statement, it must be voluntary, and without threats or promises; though a police officer, in whose custody defendant was, had previously used strong language to induce defendant to confess, but the confession was not made at that time. *People v. Mackinder* (Sup.), 61 St. Rep. 525; 80 Hun, 40; 29 N. Y. Supp. 842.

Confessions of defendant, made to officers, having him in charge, to the public prosecutor, and to the reporters of newspapers, where no threats were used to extort them, are admissible in evidence. *People v. Deacons*, 15 St. Rep. 526; 109 N. Y. 377.

The statement of an officer that the defendant might as well own up, as he had enough to convict her, and that she might consider herself under arrest, cannot be regarded as a threat sufficient

to render subsequent declarations incompetent, even though such declarations are considered a confession. *People v. McCallam*, 4 St. Rep. 291; 103 N. Y. 598; 5 N. Y. Cr. 152; aff'g, 3 N. Y. Cr. 196.

A confession to an officer making the arrest, who cautioned defendant that whatever he might say would be used as evidence against him, and who informed defendant "that it might go lighter with him if he told all about" the crime, is admissible, in the discretion of the court. *Thomas v. State* (Tex. Cr. App.), 32 S. W. 771.

The fact that a defendant was in arrest and secured by a handcuff placed on one hand, and connected by a chain with the buggy in which he was riding, in company with an officer who had in his pocket the warrant under which he had been committed on a charge of larceny, do not of themselves constitute duress, so as to exclude any material declaration made to the officer in reference to the crime; and, unless it appears that the defendant was induced to make the declaration by some advantageous offer, or by threats, or actual force, arousing hope or exciting fear in his mind, it is not error to admit the officer's testimony. *State v. Whitfield* (N. C.), 13 S. E. 726.

Where defendant in a murder case, after having been shot by officers sent to arrest him, and being in great fear, makes a confession, not being threatened in any way with reference thereto, nor thinking that his safety in any wise depended on his confessing, and not knowing that the person who shot him was an officer, such confession is voluntary, within Code Wash. 1881, § 1070. *State v. Coella* (Wash.), 28 P. 28; 3 Wash. St. 99.

Defendant testified that, when he surrendered, the jailer took him into his office, and told him it would be better for him to tell all about the difficulty. A witness, who stated that he was present when defendant surrendered, and went into the office with him, but was not present all the time defendant was in the office, testified that, while present, he had not heard the jailer tell defendant it would be better to tell all about it, and that what defendant said was voluntarily said. The jailer also denied that he made such remark or other threats or promises. Held, that defendant's confession to the jailer was competent. *Goodwin v. State* (Ala.), 15 So. 571.

WHEN NOT ADMISSIBLE.—Confessions by one under arrest, who is not cautioned, and which do not lead to the discovery of any fact tending to connect defendant with the crime, are inadmissible. *Wiseman v. State* (Tex. Ct. App.), 26 S. W. 627.

Declarations, made under the influence of a charge of guilt, under actual arrest or under examination with such a charge impending, should be excluded, except where a careful obedience to the statutory precautions is observed. *Teachout v. People*, 41 N. Y. 12.

An examination of a person, arrested on a criminal charge, which is conducted in violation of the provisions of section 395 of New York Code of Criminal Procedure, is not admissible against him on his trial for the offense. *People v. Mondon*, 2 St. Rep. 713; 103 N. Y. 220; 4 N. Y. Cr. 559.

Where defendant, after asking prosecuting witness what he would do with him if he confessed, and a statement by the latter that if the sentence was severe he would do all in his power to have it reduced, makes a confession, it is inadmissible. *State v. Smith* (Miss.), 18 So. 482.

Where a father and two sons are on trial for murder, and the mother testifies that she told one of the sons that she had been induced to come to the jail where he was, and advise him to confess by a threat of a mob to hang them all if she did not do so, and the son thereupon confessed, such confession is inadmissible, as made under a threat of violence. *Wigginton v. Commonwealth* (Ky.), 17 S.W. 634.

Where several persons were indicted for arson, and the county attorney, the city marshal, and others visited defendant to get him to turn state's evidence, which he refused to do, until, under the city marshal's insistence, he confessed to the county attorney on his promise not to prosecute, but subsequently, after being himself indicted, refused to testify on a further prosecution, on the ground that his testimony would incriminate himself, his confession is inadmissible in evidence on his own trial, as not having been given voluntarily. *Lauderdale v. State* (Tex. App.), 19 S. W. 679.

When, from the cross-examination of an officer in a criminal case, it appears that he held out inducements to the accused to confess, a confession thereafter made to him is not admissible in evidence. *Bubster v. State* (Neb.) 50 N. Y. 953.

Under Code Crim. Proc. Tex. art. 750, a confession made by a defendant, while in custody on a charge of vagrancy, that he had heretofore committed a certain theft, is inadmissible on a subsequent trial for the theft, unless defendant was cautioned as the law directs. It is not essential that defendant should be in custody for the offense then being tried in order to render his confession inadmissible without such caution. *Neiderluck v. State*, 17 S. W. 467; 21 Tex. App. 320.

Under Code, sections 3792, 3793, a confession or criminating

admission made by a person in jail to the sheriff and another, the latter of whom had him arrested and brought him to prison on another charge, and expected a reward in case of a conviction on the charge in question, is not admissible where it was induced by a remark made to the prisoner by such third person, in the presence of the sheriff, to the effect that, if the prisoner knew anything it might be best for him to tell it; and if it has been received before such inducement appears, it being brought out to cross-examination of the state's witness, a motion then made to withdraw it from the jury should be granted. *Green v. State* (Ga.), 15 S. E. 10; 88 Ga. 516.

In a murder trial, confessions by defendants, who had been approached by numerous persons, including some of the jury of inquest, and begged to confess, and had been told that it would be better for them to tell the whole truth, and that they ought to be hung, but it could not be told what the jury would do, not being free from voluntary, are inadmissible. *State v. Carson* (S. C.), 15 S. E. 588.

Admissions made to an agent of the district attorney, who interviewed defendant, before indictment found, but after prosecution was contemplated, and advised defendant that it would be for his interest and save him heavy sentence if he would own up, are incompetent against defendant. *Searles v. State*, 6 Ohio Cir. Ct. R. 331.

Rev. St. 1881, section 1802, makes inadmissible a confession obtained under the influence of fear, caused by threats. *Palmer v. State* (Ind. Sup.), 36 N. E. 130.

Where a prisoner in jail is told by the sheriff that, if he tells all about the crime, the prosecution will let him off, a confession by him is not admissible as evidence. *Collins v. Commonwealth* (Ky.), 25 S. W. 743.

A confession to a sheriff after a promise by him to use his influence to help defendant, and a statement that it would be better for him (defendant), is inadmissible. *Gallagher v. State* (Tex. Cr. App.), 24 S. W. 288.

A confession made by defendant to the officer who arrested him, and who told him that he had better tell the truth, is inadmissible. *Commonwealth v. Myers* (Mass.), 36 N. E. 481; 160 Mass. 530.

A letter written by defendant to the sheriff while in jail after the interview there, admitting that he put the sheriff on the track of C. and G., is not competent, when he had not been warned of the effect of confessions. *Rix v. State* (Tex. Cr. App.), 26 S. W. 505.

STATEMENTS BEFORE GRAND JURY.—Where one accused of a crime is taken before a grand jury, by its direction, and not of his own volition, statements then made by him, without being informed of his rights, or of the possibility of their being used in evidence against him, are not admissible on the trial, since such statements are not voluntarily made. *State v. Clifford* (Iowa.), 53 N. W. 299.

Such statements are not rendered admissible by Code, section 4285, as this section does not abrogate the rule that involuntary admissions or confessions of one charged with a crime are not admissible against him on the trial. *State v. Briggs*, 27 N. W. 358; 68 Iowa, 424, distinguished. *State v. Clifford* (Iowa), 53 N. W. 299.

CORROBORATION.—In misdemeanors, the testimony of accomplices alone is sufficient to warrant a conviction. *Rountree v. State* (Ga.), 14 S. E. 712; 88 Ga. 457.

Conviction may rest on the uncorroborated evidence of an accomplice, if it satisfies the jury beyond a reasonable doubt. *Jenkins v. State* (Fla.), 12 So. 677.

A confession by accused, supported by clear evidence of the corpus delicti, sufficiently corroborates the evidence of an accomplice. *Schaefer v. State* (Ga.), 18 S. E. 552.

The confession is to be treated as competent proof of the body of the crime, though insufficient without corroboration to warrant a conviction. *People v. Jaehne*, 3 St. Rep. 11; 103 N. Y. 199.

A defendant who has testified for the state cannot be corroborated by proof of declarations made after promises of immunity had been made, or after the hope of obtaining a light punishment by becoming a witness had sprung into his mind. *Conway v. State* (Tex. Cr. App.), 26 S. W. 401.

Where it is doubtful whether, in fact, a crime has been committed, the jury should be told that an alleged confession will not warrant a conviction, unless accompanied with other proof that such a crime has been committed. Cr. Code, § 240. *Collins v. Commonwealth* (Ky.), 25 S. W. 743.

Section 395 of New York Code of Criminal Procedure, it seems, is satisfied, when there is, in addition to the confession, proof of circumstances which, though capable of an innocent construction, are nevertheless calculated to suggest the commission of crime, and for the explanation of which the confession furnishes the key. *People v. Jaehne*, 3 St. Rep. 11; 103 N. Y. 199.

A conviction of arson was warranted where, in addition to defendant's confession that he had been "given away," there was direct evidence of the burning, and circumstantial evidence from which the jury could rightly infer that the fire was not accidental,

but felonious, the corpus delicti being thus established independently of the confession. *Westbrook v. State* (Ga.), 16 S. E. 100.

The confession of defendant, corroborated by proof, that the offense had been committed, is sufficient to authorize a conviction. *Mullins v. Commonwealth* (Ky.), 20 S. W. 1035.

A person cannot be convicted of mailing an obscene letter when the only evidence that it was deposited in the mail is his uncorroborated confession. *United States v. Boese* (Dist. Ct.), 46 F. 917.

Proof of the finding of the body of the murdered person, with unmistakable marks thereon of a murder committed, is sufficient additional proof, to meet the requirements of the latter clause of section 395 of New York Code of Criminal Code. *People v. Deacons*, 15 St. Rep. 526; 109 N. Y. 377.

In a case where the body is not found, and there is proof of violence or of death except by the confession of the accused, such confession will not suffice. *People v. Deacons*, 15 St. Rep. 526; 109 N. Y. 378.

A father and two sons were accused of murder. The evidence showed that the sons were dependent on and easily influenced by their father, and were of such low order of intellect that they could not have committed a murder so skillfully planned as the one in question without the aid of their father. It was further proved that on the night the crime was committed noises were heard and fires were built at his house at an unusual hour, and that, when under arrest, the father, in language showing knowledge of the subject, made a statement corroborative of the confessions of his sons, which confessions had implicated him. Held, that the jury were justified in convicting the father. *Wiggington v. Commonwealth* (Ky.), 17 S. W. 634.

Defendant on trial for murder was convicted on an alleged confession made to a witness a short time after the killing. Defendant and witness were friends, and no motive was attempted to be shown for false swearing on the part of the witness, whose testimony was corroborated by other facts in the case. The defendant denied the confession, and attempted to prove an alibi, which failed. Held, that the evidence of the confession was properly submitted to the jury. *People v. Fanning* (N. Y. App.), 30 N. E. 569.

Supreme Court of Illinois.

(Filed June 5, 1895.)

LITTLE v. PEOPLE.

1. TRIAL—OBJECTION.

An objection to a question generally, and a refusal to satisfy, are a waiver to the right to assign error where the defect is one that could have been cured, had it been pointed out, by a mere change in the form of the question.

2. INDICTMENT—LARCENY.

An indictment for stealing the property of "John F. Hinckley" may be sustained by proof that it belonged to "J. F. Hinckley," where there is no reasonable doubt as to the identity.

3. TRIAL—INSTRUCTION.

An instruction as to the duty of jurors, which induces a belief that they should not consult together in making their verdict, is misleading.

4. CRIMINAL LAW—REASONABLE DOUBT.

A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause.

Appeal from a judgment convicting defendant of larceny.

Donahoe & David, for appellant.

M. T. Moloney, Att. Gen., for the people.

CARTER, J.—Plaintiff in error was convicted in the criminal court of Cook county of the larceny of a diamond stud, and sentenced to imprisonment in the penitentiary for one year.

It is first objected that the evidence was not sufficient to authorize a verdict of guilty. No reason is pointed out, and we see none, why the jury should not have believed the testimony of the witnesses for the people; and, if the jury did believe their testimony, the evidence was sufficient to convict.

It is next objected that the value of the property stolen at the time and place of the taking was not proved. Some carelessness seems to have been exhibited in framing the bill of exceptions, as

well as in adducing the evidence, on this branch of the case. The prosecuting witness detailed the circumstances of the larceny of the stone, and then the record proceeds as follows: "Q. What did you do then? A. I put my hand up, and my stone was gone. Q. How much is it worth? A. \$200 or \$225. Mr. Donahoe: I move that it be excluded. Mr. Dwight: We object to it. The Court: On what ground? Mr. Donahoe: I don't wish to argue it. (Motion overruled, and defendant excepts.)" Technically the form of the question was incorrect, and, had not counsel refused to point out the objection to it, the court would doubtless have required the attorney for the people to so frame his question as to call directly for the value of the stolen property at the time of the theft. The defect was one that could have been cured, had it been pointed out, by a mere change in the form of the question. Plaintiff in error is therefore in no position to insist on a point of this character in this court which he not only failed, but refused, to make in the court below. But counsel insists that, the value proved not being the value required by law, there is in legal contemplation no value proved. This position is untenable. From the nature of the property stolen and the value as given by the testimony of this witness, there being no other evidence on the questoin, the jury was warranted in fixing the value of the property at \$200.

The next contention of plaintiff in error is that there is a variance between the name of the party injured, or the owner of the property, as laid in the indictment and as shown by the proof; the name stated in the indictment being John F. Hinckley, and as shown by the evidence J. F. Hinckley. Counsel say it cannot be known whether Hinckley's Christian name is John, James, or Joseph, and that the judgment should be reversed because of this alleged variance. The indictment was properly framed, even under under the strict rule laid down in *Willis v. People*, 1 Scam. 399, but the question is whether the proof sustains the allegation that the property stolen was the property of John F. Hinckley. It is a question of identity. In *Shepherd v. People*, 72 Ill. 480, Shepherd was indicted for the murder of Wesley Johnson. No proof was made of the Christian name of the deceased, and he was mentioned in the evidence by his surname only. But it was proved

that he was a barber, and the only barber in the place where the killing took place, and it was held that his identity with the Wesley Johnson named in the indictment as the person killed was sufficiently established. In this element of proof that case was unlike the cases of *Davis v. People*, 19 Ill. 74, and *Penrod v. People*, 89 Ill. 150. The judgments in the latter cases were reversed because the surnames only of the persons killed were proved, no other proof of identity having been adduced. In civil cases this court has held that there is no substantial variance between an allegation of a name where the full Christian name is given and the evidence where the surname is the same, but the initials only of the Christian name are proved. *Greathouse v. Kipp*, 3 Scam. 371; *Ross v. Clawson*, 47 Ill. 402. It seems that the general rule is that less strictness is required in giving the names of third persons than of the parties to the proceeding, 16 Am. & Eng. Enc. Law, 130 note. The object in naming the injured person in criminal proceedings is to identify the transaction, so that the accused may not be twice tried for the same offense. *Shepherd v. People* and *Willis v. People*, *supra*; *State v. Angel*, 7 Ired. 27. The use of the initial letters in place of the full Christian name has become general among all classes of people, and a judgment of conviction otherwise free from error ought not to be reversed because in the evidence the Christian name of the owner of the property stolen was proved only to the extent of the initials. No question was raised on the trial that the witness J. F. Hinckley, who testified to the theft of the diamond from his person, was not the John F. Hinckley named in the indictment. There can be no reasonable doubt as to the identity, and it will be presumed that the John F. Hinckley named in the indictment and the J. F. Hinckley mentioned in the proof as the owner of the property are one and the same person. There is no substantial variance, and an unsubstantial one cannot operate to reverse the judgment.

Complaint is made also of the refusal by the trial court to give certain instructions, fifteen in number, asked on behalf of plaintiff in error. These refused instructions were in the main plainly erroneous, and were properly refused. The substance of others was embraced in those given. It is unnecessary to set them out,

and review them in detail here; but we have carefully examined them, and the arguments of counsel respecting them, and do not find that the court below committed any error in refusing to give them to the jury.

We think it unnecessary to refer specially to any of the refused instructions, asked by the defendant below, except the fourteenth and fifteenth. They are: "(14) The court further instructs the jury that they can only agree to convict or acquit the defendant. Each juror should decide for himself, upon his oath, from the law and the evidence, as to what his verdict should be. No juror should yield his deliberate, conscientious convictions as to the guilt or innocence of the defendant, either at the instance of a fellow juror or at the instance of a majority. No juror should surrender his honest convictions as to the guilt of the defendant for the sake unanimity or to avert a mistrial." "(15) The court instructs the jury that a reasonable doubt is that state of the case which, after a careful comparison of all the evidence, and a deliberate consideration of the law, leaves the minds of jurors in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of every necessary fact as charged in the indictment. It is not sufficient to establish a strong probability that any one necessary fact charged is more likely to be true than the contrary; but the evidence must establish the truth of every fact necessary to constitute the crime charged to a reasonable and moral certainty,—a certainty that convinces and directs the understanding and fully satisfies the reason and judgment of each juror, who is bound to act conscientiously." Both of these instructions, while containing some accurate statements of the law, are yet erroneous and misleading. It is the duty of jurors in making up their verdict to consult with each other, and not to act each independently of the other, as would be implied from the fourteenth instruction. The fifteenth, while purporting to explain to the jury what is meant in law by the term "reasonable doubt," would itself need more explanation and elucidation than the term it undertakes to define. Among the instructions given was one which contained the following: "It is your sworn duty to fairly and impartially consider his [the defendant's] testimony,

together with all the other evidence in the case; and if, from all the evidence in the case, including that given by the defendant, you entertain any reasonable doubt of his guilt, then you must find him not guilty." It would have been proper to give to the jury an instruction properly defining the term "reasonable doubt," had such an instruction been asked, although it has been doubted by many eminent judges and text writers whether attempts to explain the meaning of the term "reasonable doubt" do not lead to confusion and misunderstanding in the minds of the jury, rather than to clear comprehension; the term itself being as easily and readily understood as any definition of it. *Hamilton v. People*, 29 Mich. 194; *People v. Stubenvoll*, 62 Mich. 329; 28 N. W. 883; *State v. Reed*, 62 Me. 142; *Mickey v. Com.* 9 Bush, 593; *Miles v. U. S.* 103 U. S. 304; 1 Bish. Cr. Proc. § 1094; 19 Am. & Eng. Enc. Law, 108. This court has, however, so often defined the term "reasonable doubt," and laid down the rule to be observed in framing instructions to the jury on that subject, that it would seem unnecessary to do so again in this case. In *Dunn v. People*, 109 Ill. 635, it was said: "This court has had occasion in a number of cases to define the scope and meaning of the term 'reasonable doubt,' and it has been uniformly held that a reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent man to hesitate and pause." *Miller v. People*, 39 Ill. 457. See, also, *May v. People*, 60 Ill. 119; *Earl v. People*, 73 id. 329; *Spies v. People*, 122 id. 1; 12 N. E. 865; and 17 id. 898; *Wacaser v. People*, 134 Ill. 439; 25 N. E. 564; *Weaver v. People*, 132 Ill. 542; 24 N. E. 571. In the latter case it was said: "The reasonable doubt that will justify and require an acquittal must be as to the guilt of the accused when the whole of the evidence is considered," and not as to any particular fact in the case. Measuring the fifteenth instruction by the rules laid down in these cases, it needs no analysis to show that the trial court ruled correctly in refusing it. An instruction couched in very similar language was condemned in *Dunn v. People*, *supra*. We are unable to find that the trial court committed any error, and the judgment must be affirmed.

Judgment affirmed.

On Petition for Rehearing.

(Oct. 16, 1895.)

We have again examined the record in this cause, together with the briefs and arguments of counsel in connection with their petition for a rehearing, and the authorities cited and others bearing upon the questions involved, and are unable to come to any different conclusion from the one first announced. Counsel are mistaken in their contention that the fifteenth instruction, set out in the opinion, is in substance the same as, and is sustained by, the instructions given to the jury by Chief Justice SHAW in the familiar case of *Com. v. Webster*, 5 Cush. 320, on the subject of reasonable doubt. If the rule were as stated in this fifteenth instruction, a greater degree of certainty of the guilt of the accused would be required to be produced by the evidence before a conviction could be had, than was stated to be necessary by the learned judge in that case, or held by the best authorities generally. The learned judge in the *Webster Case*, among other things, said: "The evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. This we take to be proof beyond a reasonable doubt; because if the law, which mostly depends upon considerations of a moral nature, should go further than this, and require absolute certainty, it would exclude circumstantial evidence altogether." It will be noticed that the reasonable and moral certainty required by the said fifteenth instruction is there said to be "a certainty that convinces and directs the understanding, and fully satisfies the reason and judgment"; that is, a certainty that completely or absolutely satisfies the reason and judgment. This would be tantamount to the requirement of absolute certainty, which was expressly said in the *Webster Case* not to be necessary. All the authorities are substantially agreed upon this point. If the instruction in question is not clearly open to the construction here put upon it, then it is too uncertain and misleading to be given to the jury in any case.

Petition for rehearing denied.

Supreme Court of Arkansas.

(Filed November 30, 1895.)

BACH v. STATE.

EXCISE—SALE OF QUANTITY.

The sale of two pints of whisky to the same purchaser, delivered at the same time, is not a sale of a less quantity than a quart within the meaning of section 4856, Sand. & H. Dig., where the circumstances are not such as to show that an evasion of the law was intended.

Appeal from a judgment convicting the defendant of selling liquors in quantities less than a quart without a license.

M. M. Stuckey and Joseph W. Phillips, for appellant.

E. B. Kinsworthy, Atty. Gen., for the State.

PER CURIAM.—The appellant, Adam Bach, was indicted and convicted in the Jackson circuit court, after trial by the court sitting as a jury, for selling liquor in quantities less than one quart, without a license, and appealed to this court. The only question in the case is as to the sufficiency of the evidence to warrant the conviction, which, as taken from the abstract of the attorney general, was as follows, to wit: "The defendant, Bach, obtained from the Jackson county court a license to sell vinous, spirituous, and malt liquors for the year 1895 in the town of Newport, Jackson county, Ark., a place where it was lawful for said county court to grant a license, and there is no question raised in this case as to the regularity of the said liquor license, or that the defendant had the right to sell liquors in said town during said year in quantities not less than one quart. That within one year of the finding of the indictment herein the said defendant did sell to one Jake Phillips two pints of whisky, the same amounting to one quart, and that the said sale of the said two pints was made to the same person at the price per quart, and at the time of sale the whole quart was delivered to the purchaser; in fact, there was only one sale, one price, one purchaser of two pints, amounting to one

quart, delivered at one and the same time. And this was all the evidence." There being no evidence to show that this putting of the quart of whisky into two pint flasks was a subterfuge or mere device resorted to to evade the law forbidding the sale of whisky in quantities less than one quart, without a license, and the circumstances detailed in evidence not being such as to show that an evasion of the law was intended, the court is constrained to regard the circumstance of putting the quart of whisky into two bottles or flasks as a mere manner of delivery of the whole amount, for the sake of convenience, or, at least, might have been the case; and a majority of the court, taking this view of the matter, are of opinion that the circuit court erred in its judgment of conviction. The cases cited by the attorney general in support of the judgment of the court below do not seem to this court to be altogether applicable. Thus, in each of the cases of *Thomas v. State*, 37 Miss. 353; *State v. Kirkham*, 1 Ired. 381; and *Murphy v. State*, 1 Ind. 366,—there was no delivery, at the time of the sale, of the whole quantity making up the quart, but substantially, in each case, the purchaser was permitted to take a portion of the whole amount, leaving the remainder to be doled out by portions in the same way, from time to time, as he, the purchaser, should call for it. In those cases it was held that the sale was in quantities less than one quart. The particular point in each was that, while there was a theoretical or pretended sale of the whole amount at one time, there was in fact no delivery at once, except in a quantity less than one quart. The conditions do not answer to the conditions of the case at bar. In the case of *Weireter v. State*, 69 Ind. 269, and *State v. Zeitler*, 63 Ind. 441, upon which the former is based, the court was construing a special statute of that state prohibiting the sale of intoxicants in less quantities than one quart to an habitual drunkard. In each of the two cases the delivery was to several others, as well as to the drunkard, although all the smaller quantities were sold to him. He drank one of them only, and the court held, under the peculiar statute, that the seller sold to the drunkard in a quantity less than one quart. The gravamen of the crime in those cases was the selling to the drunkard, and, as he consumed but the drink,—a quantity less than a quart,—the seller was held guilty. Reversed and remanded.

Court of Appeals of Kentucky.

(Filed December 5, 1895.)

COLE v. COMMONWEALTH.

APPEAL—EVIDENCE.

Where there is some evidence conducing to establish the guilt of the accused, a verdict of guilty will not be disturbed on appeal.

Appeal from a judgment convicting defendant of a crime.

D. D. Sublett, for appellant.

William J. Hendrick, for the Commonwealth.

GUFFY, J.—The appellant, Leck Cole, was indicted, tried, and convicted in the circuit court of Magoffin county for the killing of John Jackson, Jr., and sentenced to the penitentiary for life. His motion for new trial having been overruled, he prosecutes this appeal. The grounds relied on for a new trial are as follows: (1) Because the verdict is against the law and evidence; (2) because the court erred in permitting irrelevant and incompetent evidence to be given against him; (3) because the court erred in giving instructions to the jury, and in refusing instructions asked by appellant.

We have carefully considered the instructions given, as well as those refused; and it seems to us that the instructions given correctly state the law as applicable to the case on trial, and that no error prejudicial to appellant's substantial right was committed in refusing to give the instructions asked by appellant. We have carefully read the testimony introduced, and fail to find any error as to the admission or rejection of evidence. It may be conceded that there is no witness that professed to know who fired the shot that killed the deceased, but it is certain that he was killed, and almost equally certain that the killing was without excuse. There was some evidence conducing to establish the guilt of the accused, and in such cases it is exclusive province of the jury to weigh the evidence, and determine as to the guilt or innocence of the accused;

and, the jury having found the accused guilty, we have no lawful right to weigh and determine as to the sufficiency of the evidence. Judgment affirmed.

Court of Appeals of Kentucky.

(Filed December 12, 1895.)

SAPP v. COMMONWEALTH.

1. TRIAL—INSTRUCTION.

In a prosecution for malicious shooting at another with intent to kill, the court cannot change or modify the language of the statute in reference to the willful and malicious shooting with intent to kill so as to make it read that there must have been malice existing between the parties prior to the time of shooting.

2. ASSAULT AND BATTERY—PROOF.

The evidence in a prosecution for malicious shooting with intent to kill was held sufficient to warrant a conviction. •

Appeal from a judgment convicting defendant of willfully and maliciously shooting act, without wounding the prosecutor, but with intent to kill.

Levi Russell, Wm. E. Russell, and S. A. Russell, for appellant.

Wm. J. Hendrick, for the Commonwealth.

CRACE, J. — This case comes up by appeal from the Marion circuit court, wherein appellant, William Sapp, was duly convicted of willfully and maliciously shooting at, without wounding, John Smokers, but with intent to kill. The punishment of the accused was fixed by the jury at one year's confinement in the state penitentiary. This is the second time appellant has been convicted of this offense. His former appeal was passed upon by this court in November, 1894. See 28 S. W. 158. On that appeal the judgment was reversed because of the failure of the court below, in its instructions, to embrace in full, and accurately, that section of the

statute wherein is set forth the offense of shooting in sudden affray, or sudden heat and passion, without previous malice. This error has been corrected by the court on the last trial, and now, so far as we can determine, the whole law which, by any latitude of construction, may be said to be applicable to the case, has been given; the instructions setting out in the language of the statute the several offenses, whether of felony or misdemeanor, that are provided for therein. Appellant now insists that notwithstanding the correction of the previous error of the court, as there pointed out, under the statute as to a misdemeanor, the court should have gone still further, and changed or modified the language of the statute in reference to the willful and malicious shooting with intent to kill so as to make it read that there must have been malice existing between the parties prior to the time of the shooting. This has not been the practice in instructing under the statute for a felony, and we would regard it a material departure and modification of the statute as written by the legislature in setting out the offense as deemed by it deserving a higher punishment, by confinement in the penitentiary. When the jury were told that, in order to constitute the offense a felony, they must believe from the evidence, to the exclusion of all reasonable doubt, that the shooting was willfully and maliciously done, and with intent to kill, the court had done all that it was proper for it to do under these statutes. Then it was the special province of the jury to determine whether malice existed at the time, and prompted the shooting, or to determine whether it was done in sudden heat and passion, etc. Of the evidence, we deem it sufficient to say that while it was, to some extent, conflicting, yet, if the testimony offered by the prosecutor and the other witnesses for the commonwealth was believed by the jury to be the true state of the case, than it was sufficient to sustain the verdict.

Appellant was embraced in an indictment against one Bob Warner for this offense. The contention of the appellant was that there was an engagement of marriage between his friend, Warner, and a niece of the prosecutor, Smokers,—a girl of only seventeen years,—and that she had agreed to leave her uncle's on that day, and to go with Warner for that purpose. On appearing at the uncle's on that evening for the purpose of taking the girl away,

these parties (Warner and Sapp) were both drunk, and it appeared in the evidence that their debauch had commenced the day before. The uncle objected to his niece leaving and going with these parties, and told Sapp, who seemed to be the spokesman, that only the day before Bob Warner had told him that he had received a telegram from still another kinsman of the girl, at Louisville, that he wanted her to come to Louisville, where she might obtain employment and live with him. This contradictory statement, and the intoxicated condition of the men, as well as the general moral character of appellant (being also in evidence), doubtless induced the uncle to believe that these parties were in this way seeking to obtain possession of his niece for no worthy or lawful purpose; and, his niece at that time making her home with him, he was quite authorized to refuse to these parties their demands. Then it was that appellant became boisterous and belligerent, swearing that they had come after his niece, and that they intended to have her; and then only it was that Smokers, the uncle, ordered them away, and threatened them with violence if they persisted in their purpose of taking his niece. Then it was that appellant stepped to the spring wagon, near by, and got out his gun, with which they came provided (though it is said that, while it was Sapp's gun, it had been placed in the wagon by Warner). After this, and while Sapp was getting his gun, Smokers had also produced his gun. Then, after a parley, appellant and Warner agreed to leave; but in starting away, it is in evidence that Sapp, the appellant, shielded himself behind the horse, and pointing his gun at Smokers, and then, being a little way off, Sapp's gun went off, as he says, accidentally (and which is supported by other evidence), whereupon the prosecutor says that Sapp, being then near by a line of fence, again pointed his gun over the fence and at him (Smokers) who thereupon fired and that then Sapp fired at Smokers, who was on his porch, and surrounded by his wife and children and by his niece. Then it was submitted to the jury whether the firing by Sapp was—First, in his own necessary life defense, and, if so, that he was excusable under the law; and, secondly, whether it was in sudden heat and passion, or whether it was willfully and maliciously done, and

with intent to kill. Two juries have found that the shooting was done under the latter state of case. We are disinclined to further interfere with the verdict. The usual instruction was given the jury,—that when there was any doubt as to which offense accused had committed, if either, they should convict of the lesser offense only, and then, further, that if, on the whole case, they entertained a reasonable doubt of the guilt of accused, they should acquit. It is true that the statement of the circumstances existing at the time of the shooting is testified to differently by accused and by Warner, in some respects, to that of the prosecutor; yet it was given in evidence that appellant's general and moral character was bad, as also that it was bad for truth and veracity. This testimony doubtless influenced the jury to give faith and credit to the statement of the prosecutor, rather than to that of the appellant. We perceive no error of the court on this trial prejudicial to the material rights of appellant.

Judgment affirmed.

Court of Appeals of Kentucky.

(Filed December, 1895.)

SAYLOR v. COMMONWEALTH.

1. HOMICIDE—DEFENSE OF DWELLING HOUSE.

Where the deceased enters the dwelling house of defendant and first fires upon him, after he had retreated to avoid deceased, he has a right to take the deceased's life.

2. EVIDENCE—HOMICIDE.

Where, on a trial for murder, a witness has testified that he did not see the shooting, it is error to permit persons to testify that witness told them out of court that he saw the shooting, and showed them the place where it was done.

Appeal from a judgment convicting defendant of murder.

N. B. Hays, for appellant.

Wm. J. Hendrick, for the Commonwealth.

PAYNTER, J.—This is the second time this case has been here, and it was elaborately considered on the former appeal (*Saylor v. Com.* 30 S. W. 390), which obviates the necessity of writing much on this one.

The evidence establishes the fact that the accused and his wife were living at the dwelling of Burton Hensley, who was the father of the wife of the accused. They were in the house when, as the testimony conduces to prove, the deceased, with arms, made an assault on it, as well as on the accused and his wife. His occupation of the house gave him the same right to defend it as if he owned and occupied it. The court, in its opinion on the former appeal, said: "The testimony tends to prove that the deceased attacked the dwelling, struck the kitchen door, and forced it open, and entered with a weapon in his hands; and, as the accused lived there, he had the right to defend the dwelling, as the law regards an attack on it as equivalent to an assault upon his person, for a man's house is his castle. He had the right to use the force necessary to resist the attack, even to the taking of life." The testimony in this record strongly conduces to prove that the accused killed the deceased in defense of his dwelling, his wife, and himself. The preponderance of the testimony establishes this fact. Indeed, it seems to us to be so satisfactorily established that reasonable men should not entertain a doubt as to the fact. The accused did the shooting from the loft in the dwelling, where he had gone to escape the deceased and those who accompanied him. The accused did not only retreat to the wall, but did so until he was surrounded by walls. Under him were some thin boards, between which there were openings of three or four inches wide; the deceased, a bold, dangerous man, beneath, and, in the language of a witness, with the "bitter end" of his pistol pointed in the direction of the accused and his wife; and the testimony conduces to prove that he fired it at accused immediately before accused killed him.

In addition to the other instruction, the court should have given to the jury an instruction on the question of the right of the ac-

cused to defend the dwelling he was occupying at the time of the assault.

The accused introduced as a witness Silas Hensley, who testified that he did not "see a shot fired by any one, and did not see or know who did fire the shot that killed deceased." On cross-examination, the witness was asked "if he did not tell Harvey Wilson and Mary Ann Wilson, on Monday, next day after killing, above Burton Hensley, Sr.'s, near a place called the 'Carne's field,' that he saw defendant shoot deceased over the gable of the kitchen loft in the entry, and if same was not true that he did see him shoot." The witness stated that he did not tell them so, and did not see defendant shoot deceased. Continuing the cross-examination, he was asked "if he did not show Harvey Wilson, Dan Jones, and others, on the next day after the killing, where defendant was standing in kitchen loft, and where deceased was shot, and if he did not see defendant shoot deceased over the gable of kitchen loft." Witness answered "he did not." Harvey Wilson was then introduced by the commonwealth, and was asked "to state to the jury if Silas Hensley told him he [Silas] saw defendant shoot deceased in the room and from the kitchen loft." The witness was allowed to answer the question, and said "that Silas told him so." Ann Wilson was called as a witness by the commonwealth, and was permitted to testify substantially as had the witness Harvey Wilson. Silas Hensley having testified that he did not see the shooting, it was error for the court to permit the Wilsons to testify as to what they claim Hensley told them out of court. It was permitting the commonwealth to convert such statements into substantive testimony. This cannot be done. *Champ v. Com.*, 2 Metc. (Ky.) 24; *Loving v. Com.*, 80 Ky. 511. In *Loving v. Com.*, the court said: "Nor can a witness who fails to testify to substantive facts be asked if he has not made statements to others out of court that such facts exist, for the purpose of proving that he had made such statements, as would transform declarations made out of court, and not under the sanction of an oath, into substantive testimony."

Judgment reversed, with directions to grant the accused a new trial, and for further proceedings consistent with this opinion.

Supreme Court of Missouri.

(Filed December 10, 1895.)

STATE v. SIBLEY.**1. SEDUCTION—STEPFATHER.**

Section 3487 of Revised Statute, 1889, which makes it an offense for a guardian or other person to carnally know a female under eighteen years of age confided to his care, applies to defiling by a stepfather.

2. EVIDENCE—SEDUCTION.

On trial of an indictment for seduction, letters written to prosecutrix during her pregnancy, at defendant's dictation, are admissible against him. But where no indorsement or approval of its writing by him was shown, it is improperly admitted in the evidence against him. If this admission is not prejudicial to defendant, judgment will not be reversed for that reason.

3. SAME—STATEMENTS OF PROSECUTRIX.

Statements, testified to as having been made by the prosecutrix while she claimed she was out of her mind in consequence of medicine administered by defendant to cause of abortion, are inadmissible.

4. SAME.

Nor are such statements admissible for the purpose of corroborating the prosecuting witness, as they are not a part of the *res gestae*.

5. WITNESS—IMPEACHMENT.

Upon the trial of such an indictment, evidence that defendant's general character for chastity is bad, is not admissible to impeach him as a witness.

6. EVIDENCE—SPECIFIC ACTS.

Upon the trial of such an indictment, evidence of specific acts of unchastity of the prosecutrix with others is not admissible.

Appeal from a judgment convicting defendant of defiling and carnally knowing a female under eighteen years of age, confided to his care.

Geo. S. Elliott and Wm Hunter, for appellant.

The Attorney General and Morton Jourdon, for the State.

BURGESS, J. — From a conviction and sentence to imprisonment in the penitentiary for a term of two years for defiling, de-

bauching, and carnally knowing one Lula Hawkins, a female under the age of eighteen years, who was charged to have been confided to his care and protection, defendant appealed. Lula is the daughter of defendant's wife, Roxie, by a former husband, and at the time of her mother's marriage with defendant was about nine years of age. From that time on defendant clothed her, and sent her to school until she was twelve or thirteen years old, when she refused to go. She, however, continued to live with defendant as a member of his family, assisting her mother in her domestic affairs, until she left home in May, 1890, and went to St. Louis, Mo., where she has resided ever since. She had a small estate, and in 1890 one Tinkhoff was appointed her guardian, and after that time, until her estate was exhausted, he clothed her. There was nothing tending to show that Lula had ever been confided to the care and protection of defendant other than what has been stated.

She testified that when she was between twelve and thirteen years of age, and about the 1st of July, 1887, in the house, and in the forenoon of that day, during the absence of her mother from home, defendant had criminal connection with her by force and against her will; that only one member of the family was at home at the time except defendant and herself,—a little boy, who was outdoors; that he had put his arms around her, and made indecent proposals to her, on a former occasion; that after her mother returned home on the day that defendant first had connection with her she told her of the occurrence, who, a short time afterwards, told her that she would have to submit to defendant's wishes or leave home; that after that time defendant had criminal connections with her on different occasions, for as many as thirty-five or forty times, always in the same room where her mother slept, she having knowledge of what was going on at all times; that he would leave her mother's bed and come to hers, and force her by threats and abusive language to submit to his desires, and that this continued up to within two or three days of the time of her leaving home; that from this intercourse with defendant she became pregnant, and in about eight months thereafter, in the city of St. Louis, where she had gone to be confined, defendant furnishing the money to pay her expenses to that place, she was

delivered of a still-born child, of which defendant was the father; that during her pregnancy defendant gave her medicine to produce an abortion; that defendant and her mother were both well aware of her condition before she left home, and her object and purpose in so doing; that she never told any person except her mother of defendant's mistreatment of her, although she had a brother older than herself, a grandmother, and sister. The mother of Lula, and the wife of defendant, testified as a witness for defendant, and denied all knowledge of any improper relations between Lula and him. She stated that Lula was a wayward girl, and ungovernable; that after she found out that she was pregnant she endeavored on different occasions before she left home to get her to tell who was the cause of her trouble, but she would give her no satisfaction about it. She also denied that Lula had ever told her of any mistreatment or improper conduct by defendant towards her. Defendant testified as a witness in his own behalf, and denied ever having any improper relations with Lula, that he had any care of or control over her, or that he was the father of her child. The evidence as to defendant's character for morality and chastity, truth and veracity, was conflicting. He had been twice elected justice of the peace, and had at one time been a member of the county court of Scott county. The indictment was preferred in Scott county, and on application of defendant the venue was changed to Mississippi county, where the trial was had.

1. The first question for consideration is as to whether Lula Hawkins was ever, under the evidence, confided to the care or protection of defendant, within the meaning of section 3487, Rev. St. 1889. That section reads as follows: "If any guardian of any female under the age of eighteen years, or any other person to whose care or protection any such female shall have been confided, shall defile her, by carnally knowing her, while she remains in his care, custody or employment he shall, in cases not otherwise provided for, be punishable by imprisonment," etc. If the statute means that the confiding contemplated by it must be by some express contract or agreement, then Lula Hawkins was never confided to the care or custody of the defendant. But, if such confiding may be inferred from the facts and circumstances in evidence,—which we think may be done,—then the evidence in this

case showed a confiding within the meaning of the statute quoted. It was shown that at time defendant married the mother of Lula she was but nine years of age, and that from that time on he assumed control over her, clothed and provided for her, sent her to school as long as she would go, and that she continued to be a member of his family until some time after the offense is alleged to have been committed. While we concede that criminal statutes cannot be so construed as to embrace offenses not clearly within their provisions, 'yet the intention of the legislature must govern in the construction of penal as well as other statutes, and they are not to be construed so strictly as to defeat the obvious intention of the legislature." U. S. v. Wiltberger, 5 Wheat. 76. The statute was intended as much for the protection of females under the age of eighteen years, who come under the custody, protection, and control of stepfathers, under the facts and circumstances disclosed by the evidence in this case, as for their protection against their defilement by their guardians; and it makes no difference whether they be confided by express contract, by operation of law, or whether their care and protection be assumed under circumstances such as shown in the case in hand. In *State v. Woolaver*, 77 Mo. 103, which was on all fours, so far as the records disclose, in its facts, with the one at bar, a judgment of conviction was affirmed; and, while the question now under consideration was not passed upon, it does not seem to have been doubted or questioned but that the offense came within the meaning of the statute, and this we think persuasive evidence at least, that the court were then of that opinion.

2. During the trial, the state, over the objection of defendant, read in evidence the following letters from his wife to her daughter, Lula, and to his wife's cousin, Laura Hobbs, at whose house her daughter stopped upon her arrival in St. Louis:

"Commerce, May 21, 1889. Dear Lula: I will try to write you a few lines, to let you know that I got your letter the 19th, but I did not have any ink yesterday. I was glad to hear that you got there all right. I hope you will get a good place to stay. I want you to do your work good, and try to please the people where you stay, and be kind and good to them, and then they will be good to you. You must stay up there till you can come

home all right. You say that you are a little homesick. You will get over that when you get better acquainted with the people up there. I want you to take care of your money when you get it. When you write you have your letters back to where you stay, and then you'll not have to go to Laura's to get them. We are all well, and hope you are well. I have got no news to write you. You had better burn your letters, and not let people read them. You must take care of your clothes, and when you get all right go to work and get you some more. I will tell you what you had better do in the next letter I write to you. Give my love to Laura and all of the rest of them. You must write soon. So no more this time. The children all sent their love to you. Yours, as ever, Roxie Sibley.

"I will write again as soon as I hear from you."

"Commerce, Mo., May 28th, 1890. Dear Laura: You letter just received last night. I am sorry that things have happened as they have. I did not want Lula to go to your house, but she promised to get a place at once, and not go back there again. I had no chance to talk to you, or I would have told you all about it; but, as it has happened so, for God sake don't let those people down here know anything about it. In this I send you ten dollars, and you get her a place the best you can, and I will send more as soon as I can get it. I don't want her to stay at your house in that way, and if you will help me in this case I never will forget you. We will try and get the money to pay up. Mr. Sibley works hard every day, when he is able to work, to try to make an honest living for our children. I can't write any more this time, but do the best you can for me as a friend. I will write more next time, and tell you all I know about it. Sincerely, your friend and cousin, Roxie Sibley."

"Commerce, Mo., May 29th, 1890. Dear Laura: It is under a certain strain of trouble that I write you. You may think I sent Lula on you for the purpose of imposing on you, or to get her off my hands; but such is not the case. That evening when she left the house I told her not to go; to wait for some other time; and thought she would not go, until you came pass, and told me she had gone. And before that I told her, if she did go, not to stay

at your house, but to get a place, and stay at it as long as she could go, and then go to the Sisters' Hospital. I am thankful you have done as much for her as you have. I sent her ten dollars yesterday; all the money I could get, and we needed that at home. And I got a letter from her last night, and she wanted twenty dollars. I sent her all the money I could get at this time. It is no use for me to go to Tinkerhoff, for he won't let her have any, and the money has come from Mr. Sibley, and I think he has given my children enough, and let his go without what they needed; and all he gets for it is to be treated mean, and lied on. There is not one man in a thousand that would have done as much for them as he has done. Get her in the hospital if you can, and we will do the best we can. They said she had better come home. She has no home to come to any more; so you see how I am fixed. I warned her of all such, and now she will not tell me the truth about anything. I will write you more at another time. Sincerely, your cousin, Roxie Sibley."

"Commerce, Mo., June 3rd, 1890. Dear Lula: Your letter just received, and in reply will say that I have done my best to get some money to send to you to-day, but could not get it. I will send you some more as soon as I get it. That may be two or three days. Mr. Sibley works hard every day, but it takes so much to live that when a little goes out it takes several days to catch up again. You do the best you can, and save what you have got, and I will send you as fast as I can get it. If you will not say a word about it—if you don't. And as for Ed. Garvey, he had better look at home, and attend to his own business. He has lied and stole enough from me. Mother will not be as willing to help you as she was to help Hattie. She is too mean for me. Get you a place to go to, and I will send money as fast as I can get it; and if you don't keep things to yourself I am done with you forever; and don't you sign any papers for any of them, for you don't know what you are doing. Your mother, Roxie."

The letters, with the exception of the one dated May 21, 1889, while dictated by Mr. Sibley, were all written by defendant's wife, at his request, and were as much his acts as if composed by himself. They were with respect to matters in which he was as much concerned as his wife, if not more; and it did not lie in his mouth

to deny that which he had himself reduced to writing. He knew their contents, and was bound by any and all statements they contained; it matters not to whom written, or that they were signed by his wife alone. Not so, however, with the letter of May 21st. The record does not disclose that defendant had anything to do, or any connection whatever with the writing of, this letter, or that he even knew that it had been written. No indorsement or approval of its writing by him was shown, and it was, therefore, improperly admitted in evidence against him. The only question being, should the judgment be reversed on that ground? we think that its admission was not prejudicial to defendant. It merely contained advice of the mother to her daughter, and had no tendency whatever to connect in any way defendant with the unfortunate condition of the girl. It is difficult to perceive how he could have been prejudiced by reasons of its admission, and the judgment should not be reversed on that ground.

3. Lula Hawkins testified that defendant got her in trouble, and that she began to take medicine,—camphor gum, turpentine, and something else. She did not know what it was, but that it was a liquid; and, when asked if the medicine which she said Sibley had given her had any effect upon her, replied, "Yes, sir, it did." "That one day she was ironing, and when she got up she was out on the street, and did not know anything." With reference to the occurrence of the girl being in the street, and what she said at the time, one Cooksey, a witness for the state, testified, over the objection of defendant, that: "She said repeatedly: 'Sibley done it. I told Sibley it would not do I am crazy. What is the matter with me? Has the devil got me?'" Defendant was not present at the time, and it is insisted that this evidence was prejudicial error, for which the judgment should be reversed. Upon the other hand, it is contended that the declarations were properly admitted, as they tended to support the evidence of the prosecuting witness that defendant had given her medicine to produce an abortion; thus connecting him with the crime with which he is charged. The declarations were mere hearsay, and should not have been admitted. What she had reference to was at most but conjecture, as she did not say; and such statements could but have been prejudicial to the defendant in the minds of the jury is

construed—as they probably were—as being a charge by her that defendant had sustained improper relations with her, and was the cause of her condition. He had no opportunity to refute the charges, not being present and, even if he had been, and had not denied them, it is doubtful, under the circumstances and conditions of the girl at the time and the general and indefinite character of the charges, if they would have been admissible against him. Nor were the statements admissible for the purpose of corroborating the prosecuting witness, not being a part of the *res gestæ*. SHERWOOD, J., in speaking for the court, with respect to such evidence, in *State v. Patrick*, 107 Mo. 147; 17 S. W. 666, said: “And, even when admitted, such corroborative evidence must proceed from extraneous sources, and not come from the mouth of the witness, when on the stand who seeks to obtain free from her own lips the desired and desirable corroboration. The statements made by the prosecuting witness on the occasion referred to were the merest hearsay, and clearly inadmissible.

4. Witnesses were permitted, over the objection of defendant, to testify that his general character for chastity and virtue was bad. This evidence was, of course, introduced for the purpose of impeaching him as a witness, and not for the purpose of assailing his character as a party defendant though it is doubtful if its effect was no more disastrous in its application to him in his character as defendant than as witness. No evidence has been offered by him to sustain his character, and until that was done he could not be directly attacked by the statute. In *State v. Grant*, 79 Mo. 133, it was held that the rule in this state permitting a witness to be impeached by proof of general reputation for unchastity has been confined to females. The rule thus announced was followed and approved in *State v. Clawson*, 30 Mo. App. 139. So it was held in *State v. Coffey*, 44 Mo. App. 455. The more recent decisions of this court, however (*State v. Rider*, 95 Mo. 486; 8 S. W. 723, and *State v. Shroyer*, 104 Mo. 411; 16 S. W. 286), hold that the rule applies alike to both sexes, and that such reputation may be shown to discredit a male as well as a female witness. The writer adheres to the rule first stated, and is of the opinion that such evidence is inadmissible in any case for the purpose of impeaching the character of a male witness, and es-

pecially in a case like the one in hand, where the defendant's character for chastity is directly involved. It is a matter of common knowledge that the bad character of a man for chastity does not even in the remotest degree affect his character for truth, when based upon that alone, while it does that of a woman. It is no compliment to a woman to measure her character for truth by the same standard that you do that of man's predicated upon character for chastity. What destroys the standing of the one in all the walks of life has no effect whatever on the standing for truth of the other. Thus in *Bank v. Stryker*, 3 Wheeler, Cr. Cas. 382, it is said: "Adultery has been committed openly by distinguished and otherwise honorable members [of the bar] as well in Great Britain as in our own country, yet the offending party has not been supposed to destroy the force of the obligation which they feel from the oath of office. Dr. Johnson said, in discussing the difference of turpitude between lewdness in a man and in a woman, "that he would not receive back a daughter because her husband, in the mere wantonness of appetite, had gone into the servant girl." And so McCaulay said, respecting the weakness of Lord Byron for sexual pleasure, "that it was an infirmity he shared with many great and noble men,—Lord Somers, Charles James Fox, and others."

5. Evidence of acts of illicit intercourse by Lula Hawkins with persons other than defendant was inadmissible. Specific acts of unchastity were not permissible for the purpose of affecting her credibility or for impeaching her, and whatever acts of lewdness she may have been guilty of with others, if any, were no justification or excuse for defendant in having carnal connection with her, if in fact he did have, while she was under his care and control and protection. As was said in *State v. Strattman*, 100 Mo. 540; 13 S. W. 814, "Unchaste to all the world besides, she must be pure to him."

As it follows from what has been said that the judgment must be reversed, and the cause remanded for a new trial, it becomes unnecessary to pass upon the action of the court in overruling the application of defendant for a continuance. The judgment is reversed, and the cause remanded.

BRACE, C. J., and MACFARLANE and GANTT, JJ., concur, except in the fourth paragraph of the opinion, with respect to the admission of evidence as to the character of defendant for chastity, from which they dissent. BARCLAY, J., concurs in the result. SHERWOOD, J., dissents from the first paragraph and concurs in all others. ROBINSON, J., concurs.

SHERWOOD, J.—Although I concur in reversing the judgment herein, I do not think the cause should be remanded, because I do not believe that this case falls within the penalties of section 3487, Rev. St. 1889. My idea is that there must be an actual or affirmative confiding; at any rate something more than mere intermarriage with the mother of the girl betrayed. If the relations existing between stepfather and stepdaughter are sufficient to sustain this prosecution, then, under the same section, a father would also be subject to the same provisions; but no one would contend that a father is subject to such a prosecution, and this because his daughter has not been confided to his care and protection within the meaning of the statute. Constructive crimes are not known to our law. Men are not to be made subject to criminal laws by implication. Doubtless defendant is as reprehensibly guilty as though his case fell within the precise terms of the statute; but this it does not do. Touching this subject, an eminent author says: "Meaning of Strict Interpretation. Such statutes are to reach no further in meaning than their words. No person is to be made subject to them by implication, and all doubts concerning their interpretation are to preponderate in favor of the accused. Only those transactions are covered by them which are within both their spirit and their letter." Bish. St. Crimes, § 194. Criminal statutes, as Mr. Bishop happily phrases it, are inelastic, and cannot be made to embrace cases without their letter, but within the reason and policy of the law. Courts cannot, in such cases, supply a *casus omissus* in the statute. *State v. Lovell*, 23 Iowa, 304.

GANTT, J.—As stated by my associate, I dissent from so much of the opinion of the court as discredits and overrules *State v. Rider*, 95 Mo. 486; 8 S. W. 723, and *State v. Shroyer*, 104 Mo.

441; 16 S. W. 286. I do not consider that *State v. Grant*, 79 Mo. 113, is authority for the distinction made between the impeachment of male and female witnesses. In that case SHERWOOD, J., simply said: "Under the rulings in this state, a witness may be impeached not only by a general reputation as to veracity, but the inquiry may extend to the general moral character or reputation of the witness. And this ruling has been made in cases as to the general reputation of a female witness respecting chastity. "Similar rulings have been made in some other states." I am unable to find in this extract any foundation for the distinction now sought to be established between the credibility of the two sexes. The mere assertion that the general character of the female might be shown falls far short of the announcement that a male witness could not be thus attacked. The case of *Com. v. Murphy*, 14 Mass. 387, cited as authority in the *Grant Case*, drew no such distinction. As I interpret *State v. Grant* this court simply relaxed the old rule confining the impeachment to general bad reputation for truth and veracity by permitting evidence showing the general moral character of the witness to be bad, and as an example of this the Massachusetts case, permitting evidence of prostitution of a female witness, was cited. *State v. Egan*, 59 Iowa, 636; 13 N. W. 730. It is important to get at the reason underlying the decision, and the Massachusetts court put it upon the ground of the loss of moral principle. This testimony is admitted upon the ground that the prostitute, by her life of vice, has so impaired her moral sense that the obligation to speak the truth is no longer binding, or has become more or less lax. If this be true of the female, why not true of her habitual companions; and why, though there be degrees in the vice, may not a man's disregard of the laws of chastity, which compel his association with the prostitute, be shown as tending to prove a disposition to lightly regard the obligations of his oath. The rule only admits the evidence when it has ripened into a general reputation for the vice. For my part, I think it rests upon the same foundation whether the witness be male or female. It was so ruled by a unanimous court, before its separation into division, in *State v. Rider*, 95 Mo. 474; 8 S. W. 723, and was followed by this division, as then constituted, in *State v. Shroyer*, 104 Mo. 441; 16 S. W. 286; and I concurred

in the last case, and I see no reason for changing the view I then held. For these reasons I most respectfully dissent from the views of Judge BURGESS on this point.

BRACE, C. J., and BARCLAY and MACFARLANE, JJ., concur with me on this proposition.

Court of Criminal Appeals of Texas.

(Filed December 4, 1895.)

BLACKSHEAR v. STATE.

1. APPEAL—BAIL.

A recognizance, which states that defendant was convicted of "unlawfully carrying a pistol," states no offense.

2. SAME,

A recognizance to abide the judgment of a "court of appeals," instead of "a court of criminal appeals of the state of Texas," is defective.

Appeal from a judgment convicting the plaintiff in error of the offense of unlawfully carrying a pistol.

Mann Trice, for the State.

HENDERSON, J.—The appellant in this case was convicted of the offense of unlawfully carrying a pistol, was fined twenty-dollars, and now prosecutes this appeal. The recognizance in this case, in stating the offense of which appellant was convicted, denominated it "unlawfully carrying a pistol." This is no offense under our statute, and a recognizance with this recitation has been heretofore expressly held invalid. *Baizey v. State* (Tex. Cr. App.), 30 S.W. 358. There is another defect in the recognizance. It requires the appellant to "abide the judgment of the court of appeals of the state of Texas," when it should have been "the court of criminal appeals of the state of Texas." The motion of the as-

sistant attorney general to dismiss the appeal in this case on account of a defective recognizance is therefore sustained. The appeal is accordingly dismissed.

Court of Criminal Appeals of Texas.

(Filed December 4, 1895.)

ALLPHIN v. STATE.

1. INDICTMENT—DUPLICITY.

An indictment for carrying a pistol may, in the same count, charge more than one method of committing the offense.

2. SAME—INSTRUCTION.

Where, on a prosecution for carrying a pistol, there is no plea or evidence of justification, and the only issue is whether he had a pistol at the time, a charge that if the jury believes that at the time defendant had ground for fearing an attack, etc., he should be acquitted, is erroneous and prejudicial to defendant.

Appeal from a judgment convicting plaintiff in error of unlawfully carrying a pistol.

Mann Trice, for the State.

HENDERSON, J.—Appellant was convicted of unlawfully carrying a pistol on and about his person and in his saddlebags, and a fine of twenty-five dollars was assessed against him, and he prosecutes this appeal. The objection of the appellant to the indictment in this case is not well taken. It is competent for the pleader in misdemeanors to charge one or more means or methods of committing the same offense in the same count. *Comer v. State*, 26 Tex. App. 509; 10 S. W. 106. The court, in its charge to the jury, instructed them as follows: "If you believe from the evidence, beyond a reasonable doubt, that the defendant had on his person a pistol, as charged, but you should further believe

from the evidence that at the time he had said pistol he had reasonable ground for fearing an attack on his person, and you further believe the danger was so imminent and threatening as not to admit of the arrest of the person about to make the attack upon legal process, then he would not be guilty, and you should so find." The appellant duly excepted to this charge, because there was no defense of this sort set up by him, and there was no evidence in the record to justify such a charge. We have examined the record very carefully, and we find no evidence whatever therein on which to predicate such a charge. The question in the case was whether or not the appellant had a pistol on the occasion he is charged with having carried it. This was the only issue presented to the jury. This was an assumption that appellant carried the pistol, and the charge, in assuming his right to carry a pistol under the circumstances indicated therein, was not justified by any issue in this case, and was calculated to injure the rights of appellant in the assumption on the part of the court that there was some evidence in the case authorizing this defense, when there was not. *Bow v. State* (Tex. Cr. App.), 31 S. W. 170. For the error of the court in giving this charge the judgment is reversed, and the cause remanded.

Court of Criminal Appeals of Texas.

(Filed December 4, 1895.)

HUTTO v. STATE.

1. CRIMINAL LAW—VENUE.

Upon the question of venue it will not be presumed that a place mentioned as the place where the offense was committed was situate within a certain county.

2. NEW TRIAL—VENUE.

A new trial will be granted where the record does not show proof of venue.

Appeal from a judgment convicting plaintiff in error of theft.

B. F. Bean and Adams & Adams, for appellant.

Mann Trice, for the State.

HENDERSON, J.—Appellant in this case was tried and convicted in the court below of theft from the person, and his punishment assessed at two years' confinement in the penitentiary, and he prosecutes this appeal. Several errors are assigned, but there is only one that requires any notice from us.

The appellant assigns as error the failure on the part of the state to prove venue in this case. The statement of facts in this case, it appears, was made up by the judge trying the cause, the state and appellant having failed to agreed upon a statement of facts. We have examined the statement carefully, and it fails to show that the offense was committed in Trinity county. Groveton is mentioned by one of the witnesses as the place where the theft was committed, but Trinity county is nowhere named. We cannot presume that Groveton is in said county. *Fields v. State* (Tex. Cr. App.), 24 S. W. 407; *Stewart v. State*, 31 Tex. Cr. R. 153; 19 S. W. 908; *Hoffman v. State*, 12 Tex. App. 406. This rule has been so long established, and reiterated in so many cases, that it is singular that its provisions should continue to be so often overlooked in the courts below. If the venue is not proved in a case, then a new trial should be granted. If the venue has been proved, this fact should always be made to appear in the record. By the exercise of a little more care in the courts below on the part of those whose duty it is to see that the record is correct, the reversal of many cases would be avoided.

It is not necessary in this opinion to notice other assignments discussed by appellant, but, on account of the failure of the record in this case to show that the venue of offense was proved, the judgment is reversed, and the cause remanded.

Court of Criminal Appeals of Texas.

(Filed November 27, 1895.)

CLARK v. STATE.

CRIMINAL LAW—CONTINUANCE.

A defendant, upon his first application, is entitled to a continuance on the ground of the absence of material witness, where due diligence is shown, though there are other witnesses present who were with the absent witness at the time of the occurrence about which they are expected to testify.

Appeal from a judgment convicting plaintiff in error of an assault with intent to commit rape.

Lee Stroud, Gossett & Young, and Geo. F. Shaw, for appellant.

Mann Trice, Asst. Atty. Gen., for the State.

HURT, P. J.—Appellant was convicted of an assault to commit the crime of rape, and given two years in the penitentiary. This indictment was presented on the 12th day of September, 1895, and the judgment of conviction was entered on the 20th day of the same month. An application for continuance was made by appellant, for the testimony of three absent witnesses, to wit, L. D. Pollard, G. C. Pollard, and A. O. Dowdle. Without entering into a discussion of the question of diligence, we are of the opinion that it was amply sufficient. The facts expected to be proved by these absent witnesses were of the highest importance to the rights of the accused, and not at all improbable when viewed in the light of the other testimony. The ground upon which the application to continue the case was denied, is found in the bill of exceptions, which is, "that the defendant had two witnesses with him, Lum Hines and Hewitt Mathis, in the wagon with him when he came to Laroe's house, and J. N. Pollard, who was along with the witness Dowdle, by whom he could prove what transpired." It seems that the learned judge below was of the opinion that, if

there were any other witnesses present besides those for whom the continuance was sought, the application should be denied. This is the first application for a continuance, and the appellant is not restricted to any number of witnesses. Again, if this were a second or a subsequent application, under due diligence, the appellant would be entitled to a continuance, though there might be other witnesses present at the same place, and along with the absent witnesses, but he must show that he could not prove the facts sought from the absent witness by any other witness. We have examined the statement of facts very closely, and are forced to state that the testimony which tends to show the guilt of the appellant is very unsatisfactory. We think it can be demonstrated, taking the testimony of the strongest witness against the appellant, that it was physically impossible for him to have done what the prosecutrix says he did, and overtaken those people at the end of the lane. We will not reverse the judgment because of the insufficiency of the evidence, believing that, upon another trial, if the evidence remains as it is, there will be an acquittal. For the error in overruling the motion to continue the case, the judgment is reversed.

Court of Criminal Appeals of Texas.

(Filed November 27, 1895.)

PEARSON v. STATE.

1. EVIDENCE—PERJURY.

On a prosecution for perjury committed at defendant's trial for assault, wherein, as it is alleged, he falsely swore that the person assaulted had presented a pistol at him at the time of assault, evidence that such person had previously insulted defendant's wife is inadmissible.

2. TRIAL—REJECTION—TESTIMONY.

Testimony apparently inadmissible is properly rejected where counsel does not state the purpose for which it is offered and thereby show its materiality.

Appeal from a judgment convicting plaintiff in error of perjury.

Pope, Lane & Pope, for appellant.

Mann Trice, Asst. Atty. Gen., for the State.

HURT, P. J.—Appellant was convicted of perjury, and his punishment assessed at five years in the penitentiary. From the judgment and sentence of the lower court he prosecutes this appeal.

A motion was made to quash the indictment in this case upon two grounds, to wit: First, because it charges no offense against the laws of this state; second, because the same is not set forth in clear and intelligible terms, and does not advise the defendant of what he is called on to answer. These objections are very general, but, if well founded, the indictment should have been quashed. We have examined the indictment very critically, and find it a good one, in every particular. It charges, in express language, that the matter assigned as perjury was material to the issue in the first case.

Appellant was upon trial before the district court of Harrison county upon a charge of assault with intent to kill and murder one George Redding. He was a witness in the case, and swore, in substance, as follows: That he shot George Redding with a pistol, but that Redding, at the time appellant shot him, was presenting a pistol on him, and that he shot Redding to prevent said Redding from shooting him with a pistol. Perjury is assigned upon the statement that Redding, when appellant shot him, was presenting a pistol at him. On the trial, appellant proposed to prove that, a night or two prior to the shooting, Redding was at appellant's house, and called his wife out for the purpose of illicit intercourse with her, and that he was informed of the same. This evidence was clearly inadmissible upon the trial for perjury. If true, it was very insulting conduct towards his wife, and if appellant had killed him upon the first meeting, it might have reduced the homicide to manslaughter, but has no tendency to excuse or justify perjury.

The bill of exceptions in regard to the proof that Redding obtained a pistol at a repairshop in the city of Marshall, when viewed

in the light of the explanation of the court, presents no error for which this judgment should be reversed.

When Pope was offered as a witness, he was asked by his co-counsel, W. C. Lane, if he had a conversation with George Redding on the streets in the city of Marshall prior to the shooting of George Redding by the appellant. The state objected to the same as being hearsay, and the court sustained the objection. Appellant's counsel then said to the court that they wanted to state what they expected to prove by said witness, but they did not want to do so before the jury, in view of the ruling of the court. The judge then asked them if what they wanted to prove was the statement by Redding to Mr. Pope, and they said "Yes." The judge then stated to them that he would sustain objection to any statement made by Redding to Mr. Pope, as being hearsay, and would give a bill of exceptions to that effect. Counsel for appellant should have made a fuller statement in regard to this matter, informing the court that they desired to prove what occurred between Mr. Pope and Redding, and the circumstance that he procured a pistol at the repair shop. Under the statement made by counsel to the judge, we are of the opinion that he acted right in rejecting the apparently hearsay testimony.

In giving his evidence before the court and jury, appellant seemed to be unable to separate this matter from what he testified in the assault case; and being entitled to swear to what he testified in the assault case, the court permitted him to relate all about what his wife had said to him in regard to the conduct of Redding, as well as his testimony on the trial in which he is charged with committing perjury. So there is no error in this bill. The judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed November 27, 1895.)

HOWARD v. STATE.

1. CRIMINAL LAW—MURDER—INSTRUCTIONS.

A statement by the court to the attorneys, in the presence of the jury, that the result of a witness' murder case, where it was brought out in the examination of such witness that he had been indicted for murder and tried three times, had nothing to do with the case on trial, and that it could only be shown that he was indicted, has the same effect as though it had been addressed directly to the jury.

2. SAME—SECOND DEGREE.

If, upon a trial for murder in the first degree, there is no evidence tending to present a less degree of that offense, it is not the duty of the court to submit to the jury in its charge such degree.

Appeal from a judgment convicting plaintiff in error of murder in the first degree.

Mann Trice, for the State.

HURT, P. J.—This is a conviction for murder of the first degree, and the punishment assessed at confinement in the penitentiary for life.

During the progress of the trial, while Tom Bedford was on the stand as a witness for the appellant, he was asked by the counsel for the state if he was not indicted for murder. He replied that he was. Appellant's counsel then asked him how often he had been tried. He answered, "Three times." At this juncture the district attorney and counsel for the appellant became involved in some side-bar remarks in regard to the witness Bedford having been tried. When appellant's counsel stated to the court what the district attorney had said, namely, "Yes, and you can't get out of it," the district attorney immediately arose, and stated that he had not made use of any such language, but that he said to counsel that appellant "has not got out of it"; whereupon the court reprimanded counsel for indulging in side-bar remarks, and

stated to them, in the presence of the jury, that the result of the witness' murder case had nothing to do with this case, and that the only fact that could be proved was that appellant was indicted. Appellant did not request the court to instruct the jury in regard to this matter, but we are of the opinion that the remarks of the court to the attorneys, in the presence of the jury, had the same effect as if they had been directly addressed to the jury. There is no error in this matter.

Counsel for the state, on cross-examining the witness Bruce, asked him the following question, "Is it not a fact that everybody in Eagle Lake Bottom believes the defendant is guilty?" to which question appellant's counsel objected. The court sustain the objection, and the witness was not permitted to answer. There is nothing in this bill.

The bill of exceptions No. 3, with reference to appellant's going to Wharton, is in such a shape that we cannot perceive the materiality of the question propounded; but it appears that appellant was asked if he did not go to Wharton with a view of meeting Bedford and Della Foley there. He answered, that he did not. He was then asked for what purpose he went to Wharton. He replied, "To see G. G. Kelly on business." He was then asked, "What business?" The district attorney objected, and the court sustained the objection. We cannot perceive from this bill or the statement of facts how it was material to show that he went to see Kelly in regard to a trade for land. The bill does not show its materiality, nor does it state the object and purpose to be attained by the introduction of this testimony.

There is a long bill of exceptions in regard to a letter which seems to have been written by Della Foley to Tom Bedford. At one stage of the trial, counsel for appellant proposed to introduce in evidence this letter signed by Della Foley. This was refused by the court, at the instance of counsel for the state. Afterwards the letter was shown to have been written by Della Foley, and the appellant read the letter, and it went to the jury without objection. There is no error in this matter.

In his motion for a new trial, appellant complains of the charge of the court, because it does not submit to the jury murder of the

second degree. If, upon a trial for murder of the first degree, there is evidence tending to present a lesser degree of that offense, it is the duty of the court to submit to the jury in its charge that degree. The question before us therefore is, was there any evidence adduced upon the trial remotely suggesting a lesser degree of culpable homicide than murder of the first degree? There was not; for, if the testimony of Della Foley and her brother Mason Foley be true, this was an assassination. There was not a word spoken between the parties. Deceased was sitting upon a bed. Appellant broke open the door, and began firing at once, shooting him twice, from which he died almost instantly.

The court properly defined malice generally and express malice. The charge upon alibi was in the usual form which has been approved by this court.

We are requested by counsel for appellant to lay down rules with regard to reserving bills of exception. We refer counsel to the opinion in the case of *Exon v. State*, 33 Tex. Cr. R. 461; 26 S. W. 1088, where the answer to his question, we think, may be found.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, November 20, 1895.)

RIAL v. STATE.

1. CRIMINAL LAW—CONTINUANCE.

A defendant, who fails to take any steps to secure the testimony of a witness living in another county until fifteen days before the trial, is not entitled to a continuance on account of the absence of such witness.

2. SAME—APPEAL—HARMLESS ERROR.

An error, in permitting the owner of stolen property to testify as to its value, without first qualifying, is no ground for reversal, where the contradicted evidence shows its value to have been sufficient to render the crime a felony.

Appeal from a judgment adjudging the plaintiff in error guilty of crime of larceny.

Mann Trice, for the State.

HENDERSON, J.—Appellant was convicted of the theft of eleven hogs, of the alleged value of fifty dollars, and his punishment assessed at two years' confinement in the penitentiary. From the judgment and sentence of the lower court he prosecutes this appeal.

Appellant filed a motion to continue the cause on account of the absence of the witness Marcos De La Pena. It is shown in the application that said witness resides in Gonzales county, and that an attachment was issued to said county for him on the 14th day of September, 1895, and returned into court on the 27th day of said month, by the sheriff of Gonzales county "Said witness not found." The indictment in this case was returned into court on the 7th day of April, 1893, and, so far as is disclosed, no effort was made to procure the attendance of said witness until a few days before the trial, which was on the 1st of October, 1895. The diligence here shown was not sufficient. For aught that appears, if steps had been taken some months before the case was tried, said witness could have been attached and placed under bond, and his attendance secured. The appellant, in making his application for a continuance of this case, alleged that he desired the testimony of this witness to prove that he was present and saw appellant purchase the hogs he is accused of stealing from one Fostino Polanco. The appellant had said witness, Fostino Polanco, present, and placed him on stand, and said witness testified that he did not make sale of said hogs to the appellant. This testimony, in connection with the overwhelming testimony of the state as to the guilt of appellant, renders it altogether improbable that the witness Marcos De La Pena would have testified as set out, and, if he had done so, that such testimony would not have been probably true.

The appellant in this case assigns as error that the witness Rutledge, the owner of the hogs, was permitted, over his objection, to state that the hogs were worth \$50, and that he would not have taken \$50 for them. We see no impropriety in the admission of

this testimony ; but, conceding that the witness did not state that he was acquainted with the market value of the hogs, yet there was no issue upon the question of value. All of the appellant's witnesses who testified as to value—and there were several—placed the value of the hogs at from \$30 to \$44, and the appellant himself sold them for \$44, which made the case a felony in any event. There being no error in the record, the judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, November 20, 1895.)

WEST v. STATE.

1. EVIDENCE—CORROBORATION.

The refusal of the court to state that the testimony corroborating an accomplice must directly connect defendant with the crime, is not ground for reversal, where the corroborative testimony is of itself sufficient to warrant conviction.

2. SAME—CONTEMPORANEOUS CRIME.

Where, in a prosecution for burglary, the evidence shows the commission of contemporaneous theft by defendant, a charge, limiting the evidence as to the theft to its legitimate purpose, is proper.

Appeal from a judgment convicting the plaintiff in error of burglary.

Preston & Hankinson and Dwyer & Bates, for appellant.

Mann Trice, for the State.

DAVIDSON, J.—Appellant was convicted of burglary, and his punishment assessed at two years' confinement in the penitentiary. There are no bills of exception in the record. Appellant complains that the court should have given the charge asked by him on accomplice testimony. The court gave a charge on this subject, but the contention is that the court's charge was

not full enough, in that it did not state that the corroborative testimony must tend directly and immediately, and not merely remotely, to connect the appellant with the commission of the crime: that corroboration of immaterial facts, having no tendency to connect the appellant with the commission of the crime, is not sufficient; and that the corroboration must be of some criminative fact or facts. This particularity in a charge on this subject was not necessary, inasmuch as the evidence in the case, outside of the accomplice testimony, was not of a remote character, but was sufficient, in and of itself, to sustain the conviction in this case. The charge given by the court as to the appellant's intent in entering the house was amply sufficient. There could be no mistake about it, and the charge on that subject asked by appellant was not called for by the evidence in the case.

On the same night of the burglary, besides the theft of certain property from the house burglarized, the record shows that appellant stole honey from a bee gum in the yard. The court gave a charge on this contemporaneous theft, limiting the same to its legitimate purpose, but appellant contends that the court should not have given a charge on this subject at all. A failure to have done so might have been error. The record in this case amply sustains the conviction for burglary, and, there being no reversible error, the judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, November 20, 1895.)

MILLER v. STATE.

1. CRIMINAL LAW—COMMENTS OF COUNSEL.

If a statement of the state's counsel is improper, special instruction should be requested by the defendant, directing the jury to disregard it.

2. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

Newly discovered evidence, which can be used only for the purpose of impeaching a witness, is not usually ground for a new trial.

Appeal from a judgment convicting plaintiff in error of receiving and concealing a stolen cow.

T. J. McMurry and Bullock & Tankersley, for appellant.
Mann Trice, for the State.

HENDERSON, J.—This conviction was had for fraudulently receiving and concealing a stolen cow, with knowledge of its theft. Two bills of exception were reserved to the remarks of the state's counsel made in his argument to the jury, the objection urged being that said remarks alluded to the failure of the appellant to testify on the trial. Further objections were reserved to the statement of the state's counsel "that there are thousands of men in the penitentiary and filling felons' graves upon testimony not half as strong as this."

We have carefully read these remarks as presented in the bills of exception, and are of the opinion that they did not allude, directly or indirectly, to the failure of appellant to testify in the case. The statement in regard to convicts in the penitentiary and executed felons was but an assertion of the state's attorney, and, if improper, special instructions should have been requested by appellant, directing the jury to disregard them. This was not done. Wilson's Cr. Proc. § 2321.

The newly-discovered testimony, if it be such, could be used but for one purpose, to wit, to impeach the witness Cole; and, as a general rule, a new trial will not be granted to obtain such evidence. There is nothing in this case to take it out of the general rule. Wilson's Cr. Proc. § 2544.

We have examined the statement of facts very carefully, and find a serious conflict between the testimony of the state's and appellant's witnesses. The jury settled this conflict in favor of the state. This being the case, the question for us to determine is whether the testimony in support of the verdict is sufficient. We are of the opinion that it is, and cannot therefore disturb the verdict. The judgment is accordingly affirmed.

Court of Criminal Appeals of Texas.

(Filed, November 13, 1895.)

PLUMMER v. STATE.

EVIDENCE—PERJURY.

The falsity of a statement can be, on a trial for perjury, established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires.

Appeal from a judgment convicting plaintiff in error of perjury.

Mann Trice, for the State.

HURT, P. J.—Appellant was convicted of perjury, and given five years in the penitentiary. It appears from the record that the grand jury of Travis county had under investigation the matter or the fact as to whether an abortion had been committed or produced upon the body of the appellant, Lizzie Plummer; that she was a witness before the grand jury, and stated under oath that she was not pregnant on a certain day, and had not been pregnant for six months prior thereto. Upon this statement or testimony perjury was assigned.

We have carefully examined the indictment, and hold it sufficient. It appears from the record that Geneva Starks, upon the trial, swore that appellant had confessed to her that she had given birth to a child within the time covered by the indictment. She also testified that she had seen the baby. No other witness testified to this confession or to having seen the baby. Counsel for appellant requested the court to instruct the jury, if they believed from the evidence that Geneva Starks was not a credible witness, then to acquit the appellant; also requested the court to instruct the jury that, if they did not believe the testimony of Geneva Starks, to acquit appellant. These requested charges are based upon the proposition that perjury cannot be proved by circumstantial evidence, and that there must be at least one credible witness, corroborated as the law requires, swearing positively to the statement assigned for perjury. The statute (Code Cr. Proc.

art. 746) requires that the falsity of the statement be established by the testimony of two credible witnesses, or by one credible witness strongly corroborated. We hold that the falsity of the statement can be established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. In all criminal cases the guilt of the accused can be established by circumstantial evidence. Why cannot the falsity of a statement in a perjury case be established by the same character of evidence? The difference between other cases and perjury cases is this: While one witness may be sufficient to establish the guilt of the accused in other cases, the law requires two credible witnesses, or one credible witness strongly corroborated, in perjury cases. It is not the character of the proof that is contemplated by the statute, but the number and character of the witnesses. The court, therefore, did not err in refusing the requested instructions. The charge of the court was full, and a correct application of the law to the facts of the case.

If the testimony of the witnesses for the state be true, the guilt of appellant is most clearly established. If the witnesses for appellant are reliable, the appellant was not guilty. We have rarely had before us a record bristling with a greater amount of perjury. The credibility of the witnesses and the weight to be given their testimony were submitted to the jury. The jury seem to have believed the state's witnesses. We cannot revise, under the circumstances of this case, the action of the jury in coming to the conclusion that appellant was guilty. The judgment is affirmed.

State of Criminal Appeals of Texas.

(Filed, October 30, 1895.)

DOUGLASS *v.* STATE.**WITNESS—CREDIBILITY.**

The credibility of a witness who has been convicted of a felony and pardoned, is for the jury, where there is some testimony against his reputation for truth and veracity.

Appeal from a judgment convicting plaintiff in error of perjury.

Blanton & Wright and Green & Culp, for appellant.

Mann Trice for the State.

HENDERSON, J.—Appellant in this case was convicted in the district court of Cooke county of the offense of perjury, and his punishment assessed at confinement in the penitentiary for a period of five years. In our opinion, the objection of appellant to the indictment, that the alleged testimony upon which the perjury is predicated is not shown to be material, is not well taken, nor do we find any error in the charge of the court. The appellant, in his brief, mainly relies for a reversal of this cause upon the ground that the verdict of the jury is not based upon the testimony of two credible witnesses. There were two witnesses who testified to the perjury, to wit, G. W. Baker and E. S. Mayes. No question is made as to Baker, but the record shows that Mayes had been formerly convicted of a felony, and sent to the penitentiary, and that he had subsequently been pardoned. Several witnesses also testified that they know the reputation of said Mayes for truth and veracity, and that it was bad. Appellant contends first that the court should have wholly rejected the testimony of said Mayes, and either have withdrawn the case from the jury, or instructed them to disregard his testimony and acquit the appellant. Instead of doing this, the court submitted the credibility of the witness Mayes to the jury, under proper instructions. In doing this, in our opinion, the court pursued the proper course, and did

not commit error. In *Thornton v. State*, 20 Tex. App. 519, the conviction was wholly upon the testimony of a pardoned convict, and the court in that case say that it was not necessary that he be corroborated; and it has been held in a number of cases by this court that, although witnesses may testify as to the bad character of a witness for truth and veracity, yet his testimony goes to the jury, to be weighed by them, and, if they find that he is credible (that is, worthy of belief), they may find a verdict upon his testimony, and it will not be disturbed by the appellate court. So, in our opinion, the jury in this case having passed upon the credibility of the witness Mayes under proper instructions of the court, and found him credible, and there being two witnesses to the perjury assigned, we do not feel authorized to disturb the verdict. *Smith v. State*, 22 Tex. App. 196; 2 S. W. 542. There being no error in the record, the judgment and sentence of the lower court are affirmed.

Court of Criminal Appeals of Texas.

(October 23, 1895.)

RATH v. STATE.

1. INDICTMENT—BRIBERY.

Under an indictment, which charges defendant with offering to bribe a county commissioner to vote for the building of a courthouse which the commissioner's court had in contemplation, it is not necessary to allege that the defendant offered to bribe the commissioner to do or omit to do an act in violation of his duty as such officer.

2. SAME.

The offense is complete, if he offers to bribe the commissioner to vote a certain way on a matter upon which by law he was called upon to vote, and he would be guilty whether it would be for the benefit of the said county or not, or whether it would or would not be the duty of such officer to so vote.

3. SAME—PROOF OF OFFICE.

In such case, it is not necessary, in order to show that the party offered to be bribed was a commissioner, to introduce the record of his election and qualification.

4. SAME—BRIBERY.

Though the commissioner may have been perfectly willing to be bribed, the defendant would be guilty of offering the bribe.

Appeal from a judgment convicting the plaintiff in error of offering a bribe to a county commissioner.

C. C. Wells, A. G. Walker, and G. W. Cross, for appellant.

Mann Trice, Asst. Atty. Gen., for the State.

HURT, P. J.—Appellant was convicted for offering a bribe to a county commissioner of Motley county. It appears from the record that the commissioners' court had in contemplation the building of a courthouse for said county, but that they had not determined to do so. Appellant, being aware that this matter was pending or would be brought before the court, is charged with offering to bribe one Cook, a county commissioner, to vote for the building of said courthouse. The indictment is complained of by appellant in motion to quash the same. We have carefully read the indictment, and compared it with the statute defining this offense. We believe it to be good. It is objected to because it does not allege that the appellant offered to bribe Cook to do or to omit to do an act in violation of his duty as an officer. This is not necessary. The offense is complete if he offered to bribe the commissioner to vote a certain way on a matter upon which by law he was called upon to vote. The first paragraph of the article defining this offense settles this proposition. Under the second, matters or acts may be done in violation of his duty. In such cases it is proper for the indictment to set them out, but not in this case. To condense, the question was pending before the commissioners, court of Motley county as to whether or not they should build a courthouse for said county. A. offers to bribe one of the commissioners to vote for the building of the house. A. is guilty of offering to bribe an officer as defined by article 120, Pen. Code. He would be guilty whether it would be for the benefit of said county or not, or whether it would be the duty of said officer to so vote or not.

We have examined the other objections to the indictment, but

do not believe them well taken. The indictment is sufficient. The special charge requested was not the law of this case, and the court did not err in refusing to submit it. The testimony objected to in the sixth assignment of error was clearly admissible. The written contract was very powerful evidence in support of the charge he offered to give him \$1,000. The writing and the verbal propositions all went to prove an offer to bribe, and the rule that you cannot contradict a written instrument does not apply in such a case. It was not necessary, in order to show that Cook was a commissioner, to introduce the record of his election and qualification. Whether or not Cook suggested bribery to the defendant makes no difference in this case. Cook may have been perfectly willing to be bribed, and yet the defendant would be guilty of offering the bribe. We have examined carefully the brief and argument of appellant, and find no error in this record which justifies a reversal of the judgment. If Cook was to be believed, it was a clear, unquestionable case of an offer to bribe. The horse figures in this case as candy, soda water, and nuts have figured for a hundred years in the unlawful selling of whisky. It was a myth. The judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, December 4, 1895.)

McCULLOCH v. STATE.

1. CRIMINAL LAW—CONTINUANCE.

An application for a continuance for absent witnesses to prove an alibi should show that the witnesses had opportunity to see and know the facts expected to be proved by them.

2. EVIDENCE—RES GESTAE.

The statements of the defendant, made half an hour after the alleged crime, are inadmissible in his favor as part of the *res gestae*.

3. NEW TRIAL—JURORS.

A new trial should not be granted upon the affidavit of jurors that they misunderstood a clear and explicit instruction.

Appeal from a judgment convicting plaintiff in error of the crime of theft.

Mann Trice, for the State.

DAVIDSON, J.—Appellant in this case was convicted of the theft of a horse, and given five years in the penitentiary. He assigns as error the overruling of his motion for a continuance. The record shows that the indictment was presented in court on the 4th day of November, 1894; that a trial of this case was had at the November term, 1895; so that between the term of court at which the indictment in this case was found, and the trial, there intervened the April term, 1895, of the court. The application for a continuance in this case does not show it was a first application, and there is nothing in the record to authorize the court to indulge the presumption that it was a first application. If it was a first application, this should have been shown. As a second application, it was not sufficient, in that it did not show that the testimony for which the continuance was desired could not be procured from any other source. This should have been done. Conceding, however, that this may be treated as a first application, then it fails to comply with the rules of law on the subject, in that the allegations as to what the absent witness would swear are of entirely too general a character. The application stated that it was expected to be proved by two lady witnesses that the appellant was at the house of J. G. McCulloch during the entire day and night on which the offense is said to have been committed. The application in this regard should have shown such facts as an indictment for perjury could be predicated on. It should have been shown that these witnesses were at said house during the whole of said day and night, and that they had opportunity to see and know the facts expected to be proved by them. From the record, we gather that the offense charged against appellant was committed on that particular Monday evening or night, and, in order that the testimony of said witness should appear on the face of the application to be material, some facts should be stated that would show that said witnesses had opportunity to know that appellant was at the house of said J. G. McCulloch during the

whole of said evening and all of that night. As to the witness Montieith, the allegation is still more general, for it is merely stated, as to him, that he was present with the appellant on the day the offense is said to have been committed. How long he was present with him does not appear, nor is it stated at what place he was with the appellant,—whether at the house of said McCulloch, or at some other place,—and it was not stated that he would prove anything as to the whereabouts of appellant during that Monday night. In our opinion, the allegations as to what these absent witnesses would prove are too general.

Appellant offered to prove on his trial, by T. H. Warren and J. G. McCulloch, that in a half hour or an hour after he was seen by two witnesses untying the colt in question, in a thicket, in company with his co-defendant, Moore, said appellant told them about his connection with said colt,—that he was merely assisting said Moore to untie and lead it from said thicket at his request, that he did not know it was stolen, and that he had nothing to do with taking it. This testimony was objected to by the state, and excluded by the court, and appellant reserved his bill of exceptions thereto. This testimony was not offered, as we understand it, as a part of the *res gestæ*; and, if it had been, it was no part the *res gestæ* of the offense charged, or of the act of untying said colt, and so was not admissible. If the appellant, when he was caught with Moore in the act of untying the colt in the thicket, had then stated to the two witnesses who were present his connection with the matter, this testimony would have been admissible as a part of the *res gestæ* of said act, and as an explanation by the appellant when first caught in possession of the colt; but, instead of making such explanation, he ran away. If the state in this case had offered testimony of statements made by appellant contradictory to his testimony delivered on the trial, this evidence might have been admissible for the purpose of corroborating him, as showing that he had previously made statements similar to his testimony on the trial; but there is no statement in the record showing that the state introduced such contradictory testimony, and so this evidence was not admissible under this rule.

The appellant also insists in this case that the court should have given him a new trial because certain jurors did not understand

the charge in the case; and the appellant has appended to his application the affidavits of two jurors to the effect that they did not understand what the court meant by its charge that the appellant would have to be present and participate in the act of taking the animal originally, in order to convict him. The charge of the court in this regard pertinently told the jury that they must believe beyond a reasonable doubt that appellant, either himself, or in company with his codefendant, John Moore, took said animal from the possession of its owner, before they should convict him. The court further charged the jury that if appellant was not present at the time of the taking, or if they had a reasonable doubt whether at said time he was at another and different place than the place of taking, to give the appellant the benefit of such reasonable doubt, and acquit him. It occurs to us that these charges were clear and explicit, and upon the very point about which the jurors undertake to say they did not understand the charge of the court. If they did not understand this, they were not capable of understanding the meaning of terms expressed in common-sense English, and should not have been permitted to sit upon the jury at all, in the first instance. This court will not encourage the affidavits of jurors who, by stultifying themselves, seek by their affidavits to overturn their verdicts. This practice is getting entirely too common, and the lower courts should take occasion to correct it.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, December 4, 1895.)

FAVORS v. STATE.

APPEAL—AFFIRMANCE.

A judgment of conviction will be affirmed in the absence of a statement of facts with the record of the case, where the indictment is correct and the charge such a one as is proper to be given under a statement of facts provable in the case.

Appeal from a judgment convicting plaintiff in error of theft.

Mann Trice, for the State.

DAVIDSON, J.—Appellant was convicted in the court below of the theft of cattle, was given two years in the penitentiary, and from the judgment and sentence of the lower court prosecutes this appeal. There is no statement of facts with the record in this case. We have examined both the indictment and the charge of the court, and we find the indictment correct, and the charge such a one as was proper to be given under a statement of facts provable in this case.

There being no errors of record, the judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed, December 4, 1895.)

JOHNSON v. STATE.

INDICTMENT—FORGERY—PROOF.

Under an indictment, which does not allege that a fictitious person was intended to be defrauded or injured, but alleges an intent to defraud generally, proof can be made that the party whose name was signed to the instrument was a fictitious person or company.

Appeal from a judgment convicting plaintiff in error to forgery.

Mann Trice, for the State.

HURT, P. J.—Appellant was convicted of forgery, and his punishment assessed at confinement in the penitentiary for two years. The forgery is assigned upon the following instrument:

"No. 78. Henderson, Texas, June 2nd, 1894. A. Wettermark, & Co., Bankers, pay to the order of H. A. Johnson, or bearer. three hundred dollars. L. M. Pratt & Co. \$300.00." Indorsed: "H. A. Johnson." The indictment alleges that said instrument

was forged, with intent to injure and defraud, It does not allege that Pratt & Co. were the parties intended to be defrauded. Upon the trial the state proposed and did prove, over the objection of appellant, for the purpose of establishing the fact that L. M. Pratt & Co. had not signed, or authorized any one else to sign, the firm name to the draft, that L. M. Pratt & Co., was a fictitious firm or company, and that there was no such company or persons of that name in the country. This proof was made, and established, when taken in connection with all the circumstances attending this transaction, the forgery beyond any question. The objection of appellant was that the indictment, failing to allege that L. M. Pratt & Co. was a fictitious name, such proof could not be made in the absence of such an allegation. If the indictment had alleged that the forgery was with intent to injure or defraud L. M. Pratt & Co., and it should have developed that L. M. Pratt & Co. was a fictitious company, the indictment would have been fatally defective. It would have been inconsistent with the fact for the accused could not have intended to defraud a person or corporation that did not exist. 2 Bish. Cr. Law. § 543. At common law, while it was the practice to name the party intended to be defrauded or injured, still an indictment was sufficient which failed to do this. In this state we have held that it was not necessary to the sufficiency of the indictment for it to name the person intended to be injured or defrauded. Under such an indictment proof can be made that the party whose name was signed to the instrument was a fictitious person or company. 2 Bish. Cr. Law, § 543; State v. Givens, 5 Ala. 747; People v. Peabody, 25 Wend. 472; People v. Davis, 21 Wend. 309.

The question before us is not whether the party who makes an instrument, purporting to be a certain person, which person was a fictitious person, would be guilty of forgery. This question is settled in the affirmative by all the authorities. The question here is, on an indictment which does not allege that the fictitious person was intended to be defrauded or injured, but alleges an intent to defraud generally, can proof be made that such person was a fictitious person? Can such proof be made to establish the fact that the instrument was made without authority

and was hence a forgery? We hold that it can, relying upon above authorities and a great many others.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

• (Filed December 4, 1895.)

JOHNSON v. STATE.

STATUTES.—TIME OF TAKING EFFECT.

The Act of April 29, 1895, in relation to forgery, did not take effect until ninety days after the adjournment of the legislature and was, therefore, unavailable in the case tried on July 23, 1895.

Appeal from a judgment convicting plaintiff in error of passing a forged draft.

Mann Trice, for the State.

HURT, P. J.—This is a conviction for passing the forged draft named in the companion case to this. In said case the judgment was affirmed. *Johnson v. State*, 33 S. W. 231. This cause was called for trial on the 23d day of July, 1895. At that time the jury had retired to consider of their verdict in the forgery case. The appellant moved the court to postpone the trial in this case in order to plead in bar the verdict and judgment in the forgery case in the event that he should be convicted in that case. The court refused this request. In this there was no error. The act of the legislature upon which the appellant relied in support of his motion was approved April 29, 1895, and consequently went into effect ninety days after adjournment of the legislature, which adjournment occurred on the 30th of April. The act relied on by appellant did not go into effect until after this case was tried. This later act provides that you shall not convict for making, uttering, and having in possession a forged instrument; that but one conviction can be had; and if that be for the forgery,

it is a bar to a prosecution for passing or having in possession the same instrument, or vice versa. In the motion for a new trial two other grounds are urged, — the first, that the evidence was not sufficient to support the conviction. The evidence is amply sufficient to show that he passed the instrument. This is conceded by the appellant in his testimony. That the instrument was forged is very clearly proven, and that appellant knew the same to be forged. The other ground is that discussed in the other case, in regard to the proof that the names to the instrument were those of a fictitious firm.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed December 4, 1895.)

FARMER v. STATE.

WITNESS—CREDIBILITY.

The credibility of a witness may be attacked by showing that he has been arrested and placed in jail charged with a felony; but, when so attacked, his credibility may be sustained by proof of good character for truth and veracity.

Appeal from a judgment convicting plaintiff in error of assault with intent to commit a rape.

Gossett & Young, Lee Stroud, and George F. Shaw, for appellant.

Mann Trice, for the State.

DAVIDSON, J. — Appellant and one Miller Clark were indicted for assault with intent to rape. A severance was had, and Farmer placed on trial. He was convicted, given eight years in the penitentiary, and prosecutes this appeal. Hewitt Mathis and Lum Hines were very important witnesses for the appellant, testi-

fying to facts which, if true, exonerated him from the assault. It appears from the record that these witnesses were arrested and placed in jail, remaining there for a week or two, charged with the same crime as appellant. Upon cross-examination the state proved that they had been arrested and placed in jail. Mathis was also questioned in regard to a supposed conversation with Bob Mathis, occurring in Van Zandt county, to the effect that the witness had stated that, if he had not testified for appellant, they would kill the witness. Hines was also asked by the state's counsel if he had not run away from his father, in Van Zandt county. The witness denied the statement charged to have been made by him to Bob Mathis. Hines denied that he had run away from his father. The witness Mathis was twenty-one and Hines seventeen years of age. When the state was attempting to impeach the witnesses as above stated, counsel for appellant stated that he would claim the right to sustain their reputations by proof of good character for truth and veracity, and at the proper time proposed by a number of witnesses, who were neighbors of these young men in Van Zandt county, to prove their good character for truth and veracity. This was denied the appellant, and he reserved a bill of exceptions. It is a well-settled rule in this state that the credibility of a witness may be attacked by showing that he has been arrested and placed in jail, charged with a felony. When so attacked, it is not an open question that his credibility may be sustained by proof of good character for truth and veracity. No argument is required in support of this proposition. The court should have permitted this proof. And see *People v. Rector*, 19 Wend. 569; *Harrington v. Inhabitants of Lincoln*, 4 Gray, 563; *Lewis v. State*, 35 Ala. 380. The judgment is reversed and the cause remanded.

Court of Criminal Appeals of Texas.

(Filed November 20, 1895.)

MAGRUDER v. STATE.**1. EVIDENCE—HOMICIDE.**

Where, in a murder case, the deceased's wife is a witness for the defendant, she may be asked on cross-examination if she has not agreed to pay defendant's attorney's fees.

2. HOMICIDE—INSTRUCTION.

The instruction, in this case, as to the effect of anger or adequate provocation in reducing the killing to manslaughter, was held to be proper.

3. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A new trial for newly discovered evidence, which is immaterial, should not be granted.

4. SAME—CONTINUANCE.

A continuance, asked for on the fifth day of the trial, for the testimony of one already found guilty on the same charge, is properly denied.

Appeal from a judgment convicting plaintiff in error of murder in the second degree.

R. V. Bell and Walton & Hill, for appellant.

Mann Trice, for the State.

DAVIDSON, J.—Appellant was convicted in the court below of murder in the second degree, and given a term of thirty years in the penitentiary. From the judgment and sentence of the lower court he prosecutes this appeal.

There were two parties indicted for the murder of George Humphrey in this case, to wit, Elmer Jones and appellant, Magruder. A severance was had in the case, and Elmer Jones put on trial first. The jury returned a verdict in the Jones case on the 10th day of December, finding him guilty of murder of the second degree. Appellant's trial came up on the 13th day of December. He announced "Ready," and went on trial, and the trial proceeded until the 18th day of December, when he craved a postponement of the case for the testimony of Elmer Jones, his codefendant, who, as already stated, had been previously convicted of murder

of the second degree. The court very properly refused this request. The state introduced evidence in this case of the acts and declarations of said Elmer Jones, made at Gainesville the day before or the day of the killing, with reference to the purchase of pistols, and proved by said witnesses Reagan and Schoppmeyer the purchase of said pistols by Jones. By Sheriff Ware the state also proved that Jones came to him the day of the homicide, and before it occurred, and asked to be appointed deputy sheriff, and stated that he apprehended a difficulty between Magruder, the appellant, and Humphrey, and that he wanted authority to arrest one or both of them. This testimony was objected to by the appellant on the ground that no conspiracy had been proven between Jones and Magruder to take the life of the deceased, George Humphrey. We have examined the record on this question, and, in our opinion, there was sufficient evidence of the conspiracy to admit the acts and conduct of the said Jones pending said conspiracy and before its consummation, and in furtherance thereof. It is not necessary here to enumerate the facts, and, moreover, the court in its charge clearly and explicitly directed the jury as to this testimony, telling them that, if they found that there was no conspiracy between Jones and Magruder, to utterly disregard all of the acts and declarations of said Jones made to said witnesses. The state was permitted to ask Mrs. Henrietta Humphrey, who was placed on the stand by the appellant, on her cross-examination, the following questions: "Are not your feelings on the side of the defense, and do you not want to see him acquitted?" And on her answering that she did not want, under the circumstances, to see the appellant punished, that she thought he was innocent, and that her feelings were on that side of the case, the state's counsel then asked the question of said witness: "Have you not paid, or promised to pay, R. V. Bell's fee in this case for defending appellant?" Appellant's counsel objected to this question, because the witness had admitted her bias, and said the circumstance was inadmissible and irrelevant, and only calculated to prejudice the appellant before the jury. The court overruled this objection, and permitted her to answer that she had agreed to secure the counsel fees in the case in the event of an acquittal. To this proceeding the appellant excepted. In this case the wife of

the deceased stands as any other witness, and was subject to the same character of cross-examination, and it was admissible to ask her any question the tendency of which was to impeach her credibility; and the fact that she had agreed to pay the fee for defending the man who had slain her husband, it occurs to us, was a very material circumstance as going to the weight of her testimony.

Appellant complains of the court's charge on manslaughter, said charge being as follows: "If you believe from the evidence beyond a reasonable doubt that the defendant, J. A. Magruder, in Cooke county, Texas, at any time prior to and within three years of the 3d day of November. 1894, did unlawfully kill George Humphrey by shooting him with a pistol, but that, at the time of the killing, he, the said defendant, was by some adequate cause moved to such a degree of anger, rage, sudden resentment, or terror as to render him incapable of cool reflection, and that in such state of mind, and not in his lawful self-defense, he killed the said George Humphrey, then you will find the defendant guilty of manslaughter, and assess his punishment at confinement in the penitentiary for any time you see proper, not less than two nor more than five years; and in determining the defendant's state of mind at the time of the killing you will view the acts and conduct of said Humphrey at the time of the killing in the light of and in connection with all the other facts and circumstances in evidence before you." Appellant claims that this charge is too restrictive in that it does not permit the jury to look to acts and conduct of Jones in that connection. The acts and conduct of Jones were in evidence before the jury, hence constituted a part thereof; and the charge of the court in question specially authorized the jury to look to all the facts and circumstances in evidence before them. We have examined them, and, in that connection, the court's charge, and we find the same comprehensive, and covering every material phase of the case presented by the evidence; so that none of the charges asked, if they were otherwise correct, were necessary to be given.

Appellant insists that a new trial should have been granted him in this case because of the newly-discovered evidence, to wit, that Mrs. Henrietta Humphrey was not in fact the wife of the deceased;

and he introduced an affidavit tending to show this fact, and that it was newly discovered. If this be true, we fail to see in what respect it would benefit the appellant. The evidence shows that he regarded her as the wife of the deceased, and that he lived in the family a number of years, and was in fact her cousin. From his standpoint, so far as his rights are concerned, they are to be regarded as man and wife. The fact that they were unmarried, if this be true, but that he was ignorant of this, and regarded them as lawfully married, rendered this newly-discovered evidence wholly immaterial. There being no error in the record, the judgment is affirmed.

Court of Criminal Appeals of Texas.

(Filed November 6, 1895.)

KINNARD v. STATE

1. INFORMATION—ASSAULT.

In a prosecution for an assault by a teacher on a child, an allegation in the information that it was committed with switches, is a charge of the means used, the only effect of which is to confine the state to the proof of such means.

2. EVIDENCE—ASSAULT.

Where, in a prosecution for assault by a teacher upon his pupil, the defense is that the defendant as a teacher had a right to chastise his pupil, evidence that the assault was so severe as to cause the blood to flow from the pupil is admissible.

3. SAME—RES GESTAE.

Statements made by the teacher half an hour after the alleged assault are inadmissible in his favor, as part of the res gestae upon such trial.

4. SAME—INTENT.

In such prosecution, evidence of the intention of the teacher in chastising the pupil is admissible.

Appeal from a judgment convicting the defendant of an assault.

De Graffenried & Young, for appellant.

Mann Trice, Asst. Atty. Gen., for the State.

HENDERSON, J.—The appellant was convicted of an aggravated assault, and his punishment assessed at a fine of \$25, and from the judgment of the lower court he prosecutes this appeal.

There is nothing in appellant's motion to quash the information, and the court did not err in overruling same. The information, in proper terms, charged an aggravated assault, the alleged aggravation consisting in an assault by an adult male upon a child; and the allegation that it was committed with switches is a charge of the means used, and the only effect of this was to confine the state to the proof of the means so charged.

The objection urged by appellant that the state could not prove that the assault was so severe as to cause the blood to flow from the assaulted party appears to us to be frivolous. The severity of the assault, and the injuries inflicted by appellant, properly went before the jury, in order to enable them to graduate the punishment which they might inflict. And such evidence became exceedingly pertinent and necessary, in view of the defense set up, to wit, that appellant was a school-teacher, and had a right to chastise the prosecutor, who was his pupil.

What appellant told J. S. Abbott in regard to the whipping of the prosecutor was some thirty minutes after said whipping, and the appellant had in the meantime engaged in other employment, and such statements were no part of the *res gestae*, but were self-serving, and were properly excluded. In the face of the proof in this case, which was overwhelming as to the severity of the whipping inflicted by appellant,—some of the witnesses stating that appellant cut the blood out of as many as nine places on the prosecutor's legs,—we fail to see how proof of the appellant's intention, which he proposed to prove, would have availed him. See Pen. Code, art. 50.

Under the evidence in this case, it occurs to us that the jury were exceedingly lenient, as they only fined the appellant \$25 for having inflicted a most outrageous whipping on a small boy, who is not shown to have offered the least resistance, or done anything at the time calculated to cause appellant to forget his duty and

use more force than the law warranted in exercising moderate restraint and correction over his scholars. There appearing no error in the record, the judgment is affirmed.

DAVIDSON, J., absent.

On Rehearing.

(Dec. 11, 1895.)

HENDERSON, J.—At a former day of this term this case was affirmed, and it now comes before us on motion for rehearing. We have carefully considered the grounds set up in the motion, and in our opinion none of them are tenable, except that which is set up in appellant's ninth bill of exceptions. Said bill brings in review the refusal of the court to permit the appellant to testify as to his intention at the time of inflicting the corporal punishment upon Owen Plummer, who was his pupil; the appellant proposing to show by his own testimony that it was not his intention to whip Plummer severely, but that his object was merely to inflict moderate corporal punishment. In the opinion heretofore rendered in this case, we held that, in view of the testimony in the case, it was immaterial what his intention was. Upon a more critical examination of the question, however, we believe we were in error in so holding. The appellant was entitled to this testimony, in view of the peculiar facts of this case; and, whether it was worth much or little, he had a right to have the court consider his testimony as to his intention at the time. As a school-teacher he had the right to inflict moderate corporal punishment upon the prosecutor, Owen Plummer, for sufficient cause, and his intent and purpose in inflicting such punishment were material. The authorities hold that he could testify as to such intent. *Berry v. State*, 30 Tex. App. 423; 17 S. W. 1080; 9 Cr. Law Mag. p. 166, and authorities there cited. For the error committed by the court in rejecting this testimony, a rehearing is granted, and the cause is reversed and remanded.

Supreme Court of Louisiana.

(Filed December 2, 1895.)

STATE v. HENRY.

INDICTMENT—ROBBERY.

An information, which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges a statutory offense, within the intendment of Rev. St. section 810; and, as the consequence is that it, being in the words of the statute, or those certain and equivalent having been employed, is valid and sufficient.

Appeal from a judgment convicting defendant of robbery.

Hiddleston Kenner, for appellant.

Milton J. Cunningham Atty. Gen., and Prentice E. Edrington, Dist. Atty., for the State.

WATKINS, J.—The defendant, Thomas Henry, was found guilty of the crime of robbery, and from a sentence to three years at hard labor in the state penitentiary has appealed. relying upon a single bill of exception reserved to the ruling of the court overruling his motion in arrest of judgment. His contention is that robbery is not a crime which is defined in the criminal statutes of this state, and that, being a common-law crime, the English common-law must be resorted to for a definition of it; and that it is elementary that indictments for robbery must set out specifically all the essential elements of the crime of robbery at common law, and that the indictment against the accused is wholly inadequate and insufficient for that purpose; that to merely charge that the defendant has committed a robbery is not adequate or sufficient in law.

The grounds of defendant's motion are as follows, viz: "Now, under the common law, seven distinct ingredients are necessary and essential to constitute the crime of robbery, viz: (1) Ownership or right of possession of the property in the person alleged to have been robbed. (2) That the property alleged to have been

carried away must be personal property. (3) That the property carried away must be certain. (4) Force or fear must be used in taking away the property. (5) The taking away must be against the will, and without the consent of the possessor. (6) That the thing stolen must be on the person, or in the immediate presence of the possessor. (7) That the taking away must be with an intent to steal." Counsel's statement, predicated upon these propositions, is as follows: "It is hardly necessary to argue in support of this position. It is apparent that the ownership or right of possession must be in the party robbed; otherwise, a person might be convicted of robbery if he took stolen property from a robber. It is also apparent that a person claiming property as his, and taking it from another, might be guilty of assault and battery, but not of robbery. It must be personal property, as no one can steal a tract of land or a house. It must be described with certainty, because the accused is entitled to know this, in order to make a defense. Force or fear is one of the most important and absolute essential ingredients of robbery, because it forms the distinction between this crime and larceny. The taking away must naturally be against the will of the owner. The thing stolen must be on the person, or in the presence, of the owner. This forms another important distinction between the crime of robbery and larceny. And, lastly, the taking away must be with intent to steal, for it is plain that it is possible for a person to forcibly and against the will, take something without any intent to steal. Thus a man in a quarrel might take a pistol or other weapon from his assailant, or, seeing another about to destroy goods belonging to him, might interfere, and take away the goods." But we must look into the information, and see what its averments are, and whether they are amenable to the charges preferred against it. They are as follows, viz.: "That one Thomas Henry and George Corbes, * * * on or about the 13th day of July, 1895, with force and arms, in the parish aforesaid, then and there being, did unlawfully, willfully, feloniously, and violently seize, rob, take, and carry away from the person of Allen McCoy the sum of eight dollars and ninety cents in money of the legal currency of the United States, contrary to the form of the statute of the state of Louisiana in such case made and provided," etc. Our statute

says: "Whoever shall commit the crime of robbery, shall, on conviction," etc. Rev. St. § 809. But the next succeeding section is more comprehensive, for it says: "The robbery or larceny of bank notes, obligations, or bills obligatory, or bills of exchange, promissory notes for the payment of any specific property, paper bills of credit, certificates granted by or under the authority of this state or of the United States, or any of them, shall be punished in the same manner as the robbery of goods and chattels." Id. § 810. The information charging defendant with the robbery of money, legal currency of the United States, the crime must be interpreted in the light of the latter section, the former having more direct applicability to "the robbery of goods and chattels." Taken in this light, the crime charged must be considered rather as a statutory than a common-law crime, and the information tested, and its validity determined, by the rules of construction applicable thereto, seems to be legal and sufficient. This court has frequently held that indictments for offenses created by statute should be charged in the words of the statute, or in words conveying the same meaning, and sufficiently definite as to bring the accused within its operation, so that he cannot be misled as to the charge he is to answer. *State v. Stiles*, 5 La. Ann. 324; *State v. Benjamin*, 7 La. Ann. 47; *State v. Murphy*, 43 Ark. 178. In *State v. Cason*, 20 La. Ann. 48, the defendant was charged with having stolen "lawful money of the United States" under Rev. St. § 810, above quoted, and the court said: "The defendant is accused of a statutory offense. In such case the indictment should describe the crime in the words of the statute, or in words certain and equivalent, going to show that the offense has been committed, and is punishable under the law." The court then added: "No such effects or notes as 'greenbacks' are known in law, but treasury notes of the United States are recognized by the laws of congress." The information brings the charge of robbery that it charges against the defendant Henry strictly within the statute and that decision. In *State v. Carro*, 26 La. Ann. 377, the court held to be sufficient an indictment which charged that defendant "did feloniously and violently seize, take, and carry away, the sum of one hundred dollars in paper currency of the United States of America." The

court said that it was "a substantial compliance with the statute." Dev. St. § 1061. And that statute declares that, "in every indictment in which it shall be necessary to make an averment as to any money or any bank note, it shall be sufficient to describe such money or bank note as money, without specifying any particular coin or bank note," etc. Id. In *State v. Shonhausen*, 26 La. Ann. 421, the court said: "The charge of the indictment is the felonious and violent taking of the sum of seventeen hundred and forty-four dollars in paper money of the United States of America. This comes within the law. Rev. St. § 810." *State v. Robinson*, 29 La. Ann. 364. The information affirms that the defendant Henry "did take and carry away, from the person of Allen McCoy, the sum of eight dollars and ninety cents." That certainly charges McCoy's rightful possession of the money, and answers defendant's first objection as to possession. It also answers his second objection, with regard to the property having been personal. It also answers the third objection, as to the property carried away being certain. The information affirms that the defendant "did unlawfully, willfully, feloniously, and violently, seize, rob, take, and carry away from the person of Allen McCoy," etc.; and Wharton says that, "while there must be a felonious taking of property from the presence of another, either by actual or by constructive force, * * * yet, if force be used, fear is not an essential ingredient." Whart. Cr. Law, § 850. This is a complete answer to defendant's fourth objection. That author further says: "As a rule, robbery must be against the will. At the same time as in the parallel case of rape 'against the will,' if there be force, is to be treated as convertible with 'without consent,' etc. Id. § 855. That is an answer to defendant's fifth objection. The indictment charges that defendant "did seize, rob, take, and carry away from the person," etc., and this answers defendant's sixth objection. With regard to the intent, the information charges that the defendant did "unlawfully, willfully, feloniously, and violently seize, rob, take, and carry away," etc.; and Wharton says that "the goods also must appear to have been taken *animo furandi*, as in cases of larceny, though this is to be judged of from circumstances." Id. § 848. This answers defendant's seventh, and last, objection.

A careful scrutiny of the information, and a comparison of it with the law, has satisfied us that the defendant's objections are not well founded.

Judgment affirmed.

Supreme Court of Louisiana.

(Filed December 2, 1895.)

STATE v. CASE.

JURISDICTION—COURTS.

Under article 81 of the Constitution, which confers jurisdiction upon the supreme court in criminal cases only, when the punishment of death or imprisonment at hard labor may be imposed, or a fine exceeding \$300, is actually imposed, the supreme court has no jurisdiction of an appeal from a judgment imposing a fine of \$15 for gambling.

Appeal from a judgment convicting defendant of gambling.

A & C. Fontelieu, for appellants.

M. J. Cunningham, Atty. Gen., for the State.

NICHOLLS, C. J.—Defendants, charged with violation of Act No. 7 of 1892, entitled “An act to prohibit the gambling game of craps and to provide punishment therefor,” and found guilty, were each sentenced to pay a fine of \$15 and costs of suit. They appealed. The state moves to dismiss the appeal on the ground that this court is without jurisdiction, *ratione materiae*, to entertain the appeals, under article 81 of the Constitution. The contention of the state is well founded. The appeals are hereby dismissed.

Supreme Court of Louisiana.

(Filed December 2, 1895.)

STATE v. VICKERS.

1. WITNESS—IMPEACHMENT.

It is a general rule that a party cannot impeach the testimony of his own witness.

2. SAME—PREVIOUS DECLARATIONS.

When a party is bona fide surprised at the unexpected testimony of his witness, he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection, and to lead him, if mistaken, to review what he has said.

3. SAME—WHEN ADMISSIBLE.

If the sole effect of such interrogation is to discredit the witness, apart from statutory regulations, such evidence is not admissible; but if the purpose be to show that the witness is in error, it is admissible.

4. SAME—CREDIBILITY.

Though the answer of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry, as proof by other witnesses that his statements are incorrect, would have the same effect.

5. SAME—IMPEACHMENT.

When a witness for the state on the trial states an important and material fact on cross-examination, which he failed to state as a witness on a former trial, this omission of the fact from his former statement cannot be used as a means of impeaching his testimony directly by the state.

6. SAME.

The state cannot impeach its own witness by asking irrelevant questions, the object of which is to discredit his testimony.

7. APPEAL—FIRST INSTANCE.

It is too late on a motion for a new trial to urge objection to the judge's charge, when no instructions on the point were asked, and no exceptions made.

Appeal from a judgment convicting defendant of manslaughter.

John C. Pugh and Goss & Parsons, for appellant.

M. J. Cunningham, Atty. Gen., and J. B. Lee, Dist. Atty., for the State.

McENERY, J.—Under an indictment for the murder of L. S. Chovose, who was killed by defendant in a difficulty with other parties, the defendant was convicted of manslaughter. He appealed.

The first point made by defendant is that the state cannot discredit his own witness. A state witness, when cross-examined by the defendant, stated "that his brother had a pistol, and handed it to him during the difficulty." On re-examination the district attorney asked the witness if he had testified on the former trial "that his brother had a pistol, and handed it to him during the difficulty." The prosecution contends that the state was taken by surprise by the answer of the witness to the cross-interrogatories, and "it had the right to contradict him, and to destroy the testimony of the witness." This last statement in quotation marks, is found in the brief of the district attorney, and is too broad, and cannot be sustained. Apart from statutory regulations, such evidence is not admissible. *Coulter v. Express Co.*, 56 N. Y. 585; *People v. Jacobs*, 49 Cal. 384; *State v. Shonhausen*, 26 La. Ann. 421; *State v. Thomas*, 28 La. Ann. 827. The record shows that the trial judge permitted the question to be answered for the sole purpose of discrediting the witness. On this point the record discloses the following statement by the judge: "As to the question asked W. A. Pearce, the state claimed surprise at the testimony of the Pearces, and the court believed the claim of surprise well founded. * * * As to the question asked Robert Pearce, the court did not understand that the only object of the question was to impeach and discredit the witness, although it was admissible for that purpose on the same ground of surprise as his testimony about the pistol, although he was not sworn at the former trial." From the bills we understand that the testimony of both witnesses, W. A. Pearce and Robert Pearce, was to a fact not disclosed on the former trial and at the coroner's inquest. W. A. Pearce was a witness at the inquest and at the trial. Robert Pearce did not testify on either of these occasions. With reference to the question propounded to the first witness, its object was to discredit his testimony. It is a general rule that a party cannot impeach the testimony of his own witness.

State v. Shonhausen, 26 La. Ann. 421; State v. Thomas, 28 La. Ann. 827. The exception is that he is sometimes permitted, in cases of hardship, when the testimony of the witness is unexpectedly unfavorable, to contradict him by other evidence relevant to the issue in the case. 1 Starkie, Ev. 147; 1 Greenl. Ev. pars. 442, 443; 3 Rice, Ev. p. 373; State v. Simon, 37 La. Ann. 569. And where a party is bona fide surprised at the unexpected testimony of his witness, he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection, and to lead him, if mistaken, to review what he has said. 1 Whart. Ev. par. 549; 3 Rice, Ev. par. 237. But this proceeding is quite different from impeaching his credibility directly for the sole purpose of destroying, as claimed by the prosecution, his whole testimony. Generally, where proof is to be offered that a witness has said or done something inconsistent with his testimony, a foundation must be first laid, and an opportunity for explanation offered, by asking the witness whether he has not said or done what it is proposed to prove, specifying the particulars of time, place, and person. 1 Greenl. Ev. 463; Conrad v. Griffey, 16 How. 38; Brubaker's Adm'r v. Taylor, 76 Pa. St. 83. The same course is pursued, when allowed by statute, with a witness on his examination in chief, if the judge is of the opinion that he is hostile to the party by whom he was called. If the sole effect is to discredit the witness, apart from statutory regulations, such evidence is not admissible; but if the purpose be to show the witness in error, it is admissible. Bullard v. Pearsall, 53 N. Y. 230. In the case just cited, we think the law is correctly stated as follows: "This course of examination may result in satisfying the witness that he has fallen into error and that his original statements were correct; and it is calculated to elicit the truth. It is also proper for the purpose of showing the circumstances which induced the party to call him. Though the answer of the witness may involve him in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry. Proof by other witnesses that his statements are incorrect would have the same effect, yet the admissibility of such proof cannot be questioned. It is only evidence offered for the purpose of im-

peaching the credibility of the witness, which is inadmissible when offered by the party calling him. Inquiries calculated to elicit the facts, or to show to the witness that he is mistaken, and to induce him to correct his evidence, should not be excluded simply because they may result unfavorably to his credibility." The witness, W. A. Pearce, was a state witness, and on two occasions failed to state that his brother had handed him a pistol. On the second trial the fact, as stated by him, was disclosed on cross-examination by defendant's counsel. It was a statement unfavorable to the prosecution, and, we infer from the briefs, material and important to the defendant in his plea of self-defense. The witness' testimony was inconsistent with his prior testimony, in which he suppressed, if the statement be true, an important and material fact. In reference to inconsistent statements, Mr. Rice, in his work on Evidence (vol. 3, par. 236), says: The party producing a witness is not allowed to impeach his credit by evidence of bad reputation, except when he is compelled to produce him by reason of the nature of the evidence sought; but he may contradict him by other evidence, and he may also ask him whether he has not made, at other times, statements inconsistent with his present testimony. Under all rules of reason, he is not allowed to contradict his witness upon any particular or material fact." This has reference to the material fact as bearing on the credibility of the witness. The law is thus stated by Greenleaf: "You may cross-examine your own witness if he testify contrary to what you had a right to expect as to what he had stated in regard to the matter on former occasions, either in court or otherwise, and thus refresh the memory of the witness, and give him full opportunity to set the matter right if he will; and, at all events, to set yourself right before the jury. But you cannot do this for the mere purpose of discrediting the witness; nor can you be allowed to prove the contradictory statements of the witness upon other occasions, but must be restricted to proving the facts otherwise by other evidence." And in the case of *Coulter v. Express Co.*, 56 N. Y. 585, it was held that a party may contradict his own witness as to a fact material to the case, although the effect of the proof may be to discredit him; but he cannot impeach him, although subsequently called as a witness for the ad-

verse party, either by general evidence or by proof of contradictory statements out of court. The witness was presented by the prosecution as worthy of credit, and he could not be impeached, either by general evidence or by proof of contradictory statements in or out of court. He could have been contradicted as to a fact material to the case, although the effect of the proof may have discredited him; but the party calling him could not have adduced such contradiction when it is only material as it bore upon his credibility. In the instant case the prosecution might have shown by other testimony that no pistol was handed to the witness by his brother, but he was not at liberty to prove that on a former trial the witness had omitted this fact from his testimony, as the fact of the omission went directly to the witness' credibility. The prosecution, although taken by surprise, so far as the witness was concerned, was limited to the interrogation heretofore alluded to, and the giving the witness the opportunity of explaining the inconsistency in his testimony.

The question was asked the witness Robert Pearce, sworn on behalf of the prosecution by the district attorney, if he had not gone to Texas a short time prior to the last term of court, how much money he had, and from whom he obtained it. The question was allowed to be answered. Although the answer of the witness dissipated, to some extent, at least, the effect which the question intended to produce, yet it was improper. Its sole purpose was to discredit the witness, as it was irrelevant, and could have no other effect. For the reasons stated in reviewing the question asked the witness W. A. Pearce this evidence was equally inadmissible.

The trial judge refused to permit certain threats of the Pearces to go to the jury. His reasons, appended to the bill, are sufficient to justify his ruling. He says: "The above statement of the evidence on the trial only purports to be a part of the testimony, and is, in fact, only a part of it, except the testimony of Robert Pearce, which was written down in full. The prisoner's testimony is quoted substantially right, except that he said that the gun might have been fired accidentally, or something to that effect. W. A. Hick's testimony should be that W. A. Pearce replied to Vickers' denial, 'Well, if you did, I wanted to be

ready,' or 'wanted you to let me know, so that I could be ready,' or that he was ready, or words to that effect. The evidence showed that the difficulty arose between Vickers and W. A. Pearce in the presence of Robert Pearce, * * * and that his name was not mentioned; and that the alleged conspiracy between old man Pearce and Robert occurred after W. A. Pearce had left the house that morning; and that W. A. Pearce was unarmed, and said nothing about it, if it existed; and that the old man Pearce did not arrive on the scene until after all was over, and the parties had scattered. Under these circumstances I did not see how the threats made by old man Pearce were admissible in justification of the shooting at W. A. Pearce, his son, when the old man was not present." We need add nothing to this statement, as it shows that, if any threats were made, they were the threats of old man Pearce, who was not engaged in the difficulty; and that, if there was a conspiracy among them to take the life of Vickers, no threats had been communicated to him. Even communicated threats will not justify an assault upon another, unless the party making them attempts to carry them into execution by a hostile demonstration.

A motion for a new trial was filed and overruled. It embodies the matter reserved in the bills of exception, and further alleges that the judge had not charged the jury as to the legal effect of the accidental discharge of the prisoner's gun, and that one of the jurors who tried the case was disqualified, as he had formed and expressed an opinion as to the guilt of the defendant prior to the trial. As to the accidental discharge of the gun and its legal effect, no instructions were asked for on this point, although the written charge of the judge had been submitted to the attorneys of the defendant. It is unnecessary to pass upon the question raised as to the qualification of the juror, or the exception to the judge's refusal to give the special charge as to a reasonable doubt. The judgment appealed from is annulled, avoided, and reversed, and it is now ordered that this case be remanded to be proceeded with according to law.

NOTE ON IMPEACHMENT.

A party cannot impeach his own witness. *People v. O'Neill* (Mich.), 65 N. W. 540.

Witness not shown to be acquainted with defendant's general reputation for veracity is incompetent to impeach his testimony. *People v. Onley* (N. Y.), 7 S. R. 794.

Extent of right to cross-examine as to evidence impeaching general character of witness. *Mather v. Freelove* (N. Y.), 3 S. R. 424; 42 Hun, 551.

Contradiction among witnesses is no ground for admitting evidence of the general character of either of them for truth and veracity, where their character has not been assailed. *Saussy v. South Florida R. Co.*, 22 Fla. 327.

Evidence of character to support the credit of a witness is not receivable before impeaching evidence has been adduced, even though the witnesses to character attend the trial voluntarily, and refuse to wait until their testimony is receivable. *Travelers' Ins. Co. v. Sheppard* (Ga.), 12 S. E. 18; 85 Ga. 751.

REPUTATION FOR TRUTH AND VERACITY. Evidence to show plaintiff's reputation, is not admissible, where such reputation has not been attacked. *Osmun v. Winters* (Or.), 35 P. 250.

In order to impeach a witness, it must be shown that his reputation is generally reported and considered bad in the community. *Winter v. Central Iowa Ry. Co.* (Iowa), 45 N. W. 737.

Witnesses who have testified that another's reputation for truth is bad, may be asked whether from that general reputation he is worthy of belief on oath. *Mayes v. State* (Tex. Cr. App.), 24 S. W. 421.

In a criminal trial, where the credibility of defendant's evidence is not attacked, evidence sustaining his reputation for "truth and veracity," is not admissible. *Funderberg v. State* (Ala.), 14 So. 877.

In discrediting a witness, the inquiry is not limited to his general reputation for truth, but may be extended to his general moral character. *State v. Raven* (Mo. Sup.), 22 S. W. 376.

Where witnesses introduced by defendant to impeach a witness for the state testify that they know the latter's general reputation for truth and veracity in the community in which he lives, and that it is bad, it is error to refuse to permit them to answer whether, from their knowledge of his general reputation for truth and veracity, they would believe him under oath. *Paradise v. Insurance Co.*, 6 La. Ann. 596; *Stanton v. Parker*, 5 Rob.

(La.), 109, followed; *State v. Christian* (La.), 11 So. 589; 44 La. Ann. 590.

Bad character may be proved against a witness for the purpose of impeaching his credibility, though the witnesses who testify as to his character fail to state that his character or reputation is such that he would not be believed when testifying on his oath. *Mitchell v. State* (Ala.), 10 So. 518.

The omission, from questions to witnesses as to the reputation for truth and veracity of a previous witness, of the word "general," does not render their testimony on the subject incompetent, where their answers show that they understood the question in a general sense, and the answers themselves are sufficiently general. *Coates v. Sulau* (Kan.), 26 P. 720.

Where the general reputation of a witness for truth and veracity in the neighborhood where he resides is proven bad, the jury may entirely disregard the testimony of such witness, except in so far as he is corroborated by other credible testimony. *Watson v. Roode* (Neb.), 46 N. W. 491.

Though it is error to permit the state to show that the reputation of the prosecuting witness for truth and veracity was good when his credibility has not been attacked, a new trial will not be granted on this ground alone. *Green v. State* (Tex.), 12 S. W. 872.

Before a witness should be allowed to impeach another on the ground of his reputation for truth, it should be first shown that he has sufficient knowledge of such person's general character to base an opinion thereon. *Cole v. State* (Ark.), 26 S. W. 377.

One who is acquainted with another's general reputation for truth in the neighborhood in which he (other) lives, may testify as to such other's general character. *State v. Fairlamb* (Mo. Sup.), 25 S. W. 895.

Where the witness has stated the reputation of another for veracity from what he has heard of it in the neighborhood, it is error for the court to state that he can only testify to what he knows of it of his own personal knowledge. *People v. Webster* (Cal.), 26 P. 1080.

Witness may testify from personal knowledge whether he would believe another under oath, though he has never heard of his reputation for truth and veracity. *Nat. Bank of Troy v. Scriven* (N. Y.), 44 S. R. 331; 63 Hun, 375.

In the impeachment of a witness, the inquiry must be confined to his general reputation for truth, and cannot be extended to his general and moral character. *Kennedy v. Upshaw* (Tex.), 1 S. W. 308; 66 Tex. 442.

A witness called to impeach another testified that he had been in the same business as the latter for eighteen years, and had had dealings with him, and was then asked what was the reputation of such witness for truth and veracity, and whether he would believe him under oath. Held, that it was not error to exclude the questions for want of a proper foundation. *Healey v. Terry*, 9 N. Y. S. 519.

On an indictment for murder, where defendant brings himself within the rule in introducing evidence of general reputation for the purpose of impeaching the credibility of a witness, it is error to exclude such evidence. *Hodge v. State* (Fla.), 7 So. 593.

A witness, who had lived for many years in another state, had removed to his place of residence at the time of the trial only a few months previous thereto. Held, that evidence as to his reputation for truth and veracity in the place of his former residence was competent to impeach him. *Coates v. Sulau* (Kan.), 26 P. 720.

A person who states that he is not much acquainted with the general reputation for veracity of a witness in the community where he lived, and that he cannot say exactly what his reputation is, is not competent to testify as to his reputation. *Redden v. Tefft* (Kan.), 29 P. 157.

On an indictment for murder, a question as to the general reputation of a witness for veracity is properly excluded, where it does not call for such reputation in the neighborhood where such witness lives. *State v. Johnson* (La.), 7 So. 670; 41 La. Ann. 574.

Where, on a trial for incest, the testimony of the prosecuting witness as to the paternity of her child is contradicted by evidence of statements made by her to several witnesses, the prosecution may show her good reputation for veracity in the neighborhood where she lives. *Tipton v. State* (Tex. App.), 17 S. W. 1097.

A witness may testify that from his personal knowledge of another he would believe him under oath, though he knows nothing of the reputation of such person among others for truth and veracity. *National Bank v. Scriven* (N. Y.), 18 N. Y. S. 277; 63 Hun, 375.

Evidence of a witness' bad reputation for truthfulness in a county where he had lived until four years before is competent, as it will not be presumed that one of mature age, and of a notoriously bad reputation, has so reformed within four years as to acquire a different reputation. *Maynatt v. Hudson*, 17 S. W. 396; 66 Tex. 66.

The fact that a defendant has already successfully attacked the character of the state's witness for truth and veracity would not

preclude him from introducing cumulative testimony. *Browder v. State* (Tex. App.), 18 S. W. 197.

Where a witness, offered to impeach the character of another for veracity, testifies that he knows the general reputation of the party to be impeached in the neighborhood in which such party lives for truth and veracity, the foundation for proving what that reputation is has been sufficiently laid, and witness should be permitted to go on and testify as to what the reputation is, and whether he would believe such party under oath, and he cannot be cross-examined to test the extent and sources of his information until he has been turned over in regular order for cross-examination in general at the close of the examination in chief. *Nelson v. State* (Fla.), 13 So. 361.

The fact that one does not know another personally does not preclude him from testifying to the general reputation of such person for the purpose of impeachment. *State v. Turner* (S. C.), 15 S. E. 602; 36 S. C. 534.

The general reputation of a witness for truth, honesty, and integrity cannot be established by his reputation as to those particulars among the police officers of a small town. *People v. Markham*, 30 P. 620; 64 Cal. 157.

Evidence of the general reputation of a witness for untruthfulness, to be available for his impeachment, must have reference to his reputation at his present or recent place of residence, and should not relate to a residence which had ceased two and a half years before he testified. *Sun Fire Office of London v. Ayerst* (Neb.), 55 N. W. 635.

Evidence that plaintiff attempted to suborn witnesses is not impeaching evidence, but an admission against plaintiff's interests; and therefore the introduction of such evidence will not justify plaintiff in introducing proof of his general reputation for veracity. *BOND, J.*, dissenting. *Fulkerson v. Murdock*, 53 Mo. App. 151.

In impeaching defendant's witnesses for truth and veracity it was error to permit a question concerning their "reputation for morality, decency, virtue, truth, and veracity," and to admit an answer that their reputation was bad; and such error was not cured by a charge that in considering the impeachment of the witnesses the jury should leave out that part of the questions and answers which related to witnesses reputation for morality, decency, and virtue, and consider only the portion relating to their truth and veracity. *People v. Abbott*, 56 N. W. 862; 97 Mich. 484.

Where an attempt has been made to impeach a witness, not merely by testimony affecting his character for veracity, but by other modes, it is error to segregate the testimony bearing on his character for veracity from other testimony calculated to affect his credibility, and instruct the jury to consider separately the testimony as to his character for truthfulness, and if they do not believe his general reputation was that of an untruthful man, to dismiss from their minds the whole attempted impeachment, and treat his testimony as that of any other witness, — *Michigan Pipe Co. v. North British & Mercantile Ins. Co.* (Mich.), 56 N.W. 849; 97 Mich. 493.

Where a witness is impeached by proof of statements out of court in conflict with his testimony, the party calling him may show that his general reputation in the neighborhood in which he lives, for truth and veracity, is good. *Board Com'rs Carroll County v. O'Connor* (Ind. Sup.), 35 N. E. 1006.

Evidence that defendant conspired to defraud plaintiff by having goods procured for defendant by an irresponsible person charged to the latter is an attack on defendant's character, and he may prove his reputation for truth and honesty. *Loomis v. Stuart* (Tex. Civ. App.), 24 S. W. 1078.

Where the wife of a defendant in replevin brought cross suit for certain articles taken under the writ, and the actions were tried together, said wife having testified for herself, plaintiff introduced proof that, when his writ was served, she admitted her husband's ownership of all but one item. She was thereupon recalled, and denied such admissions, and others swore to her repute for veracity. Held, that such evidence of repute was admissible, since she was not a party to the main suit, and no motion was made to confine it to her cross suit. *Carr, Scott & Co., v. Shaffer* (Ind. Sup.), 36 N. E. 208.

Where the evidence of the state, in a trial for rape, depends entirely upon the testimony of the prosecutrix, and evidence has been introduced tending to show her bad character for truth and veracity, it is reversible error to allow a witness to testify that her character is good, where the witness is merely asked, as a preliminary question, whether he knows "what her reputation among the people where she lived at that time was, for truth and veracity," instead of asking him whether he knew her general reputation among her neighbors for truth and veracity. *Gifford v. People*, 35 N. E. 754; 148 Ill. 173.

Where one testifies to a knowledge of the general reputation of another, and to having "heard general conversations" in regard to his character, and the court admits him as having shown sufficient knowledge for the purpose of impeachment, the ruling of the

court will not be disturbed. *State v. Turner* (S. C.), 15 S. E. 602; 36 S. C. 534.

It is error to instruct that, where it is proven that a witness has a bad reputation for truth, and that his general reputation as to moral character is bad, he is deemed to be impeached in law, and the jury would be justified in entirely disregarding his testimony except where corroborated by other credible evidence. *State v. Larson* (Iowa), 52 N. W. 539.

The court may permit testimony as to the reputation for veracity of the witnesses to a codicil alleged to have been forged, provided said reputation did not grow out of the matters in litigation. *Kennedy v. Upshaw* (Tex.), 1 S. W. 308; 66 Tex. 442.

SPECIFIC ACTS. — The testimony of a witness cannot be impeached by evidence of particular crimes. *Lowery v. State*, 13 So. 498; 98 Ala. 45.

Character of witness cannot be impeached by proving specific acts. *People v. Greenwall* (N. Y.), 13 S. R. 638; 108 N. Y. 296.

Independent and specific acts are not competent to impeach character of accused. *People v. Drake* (N. Y.), 47 S. R. 883; 65 Hun, 331.

A witness cannot be impeached by proof of particular acts, either criminal or immoral. *Smith v. State* (Ala.), 7 So. 52; 88 Ala. 73.

Under Code Civil Proc. Cal. § 2051, a witness' credit cannot be impeached by evidence of specific wrongful acts. *Barkly v. Cope-land* (Cal.), 25 P. 1; 86 Cal. 483.

Under Code Civil Proc. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it was error to compel one of defendant's witnesses to state whether he and defendant had participated in the alteration of a record other than that charged in the indictment. *People v. O'Brien*, 31 P. 45; 96 Cal. 171.

On cross-examination, specific acts tending to impair moral character of witness may be inquired into, within the discretion of the court, but not accusations. An arrest is an accusation. *Smith v. Mulford* (N. Y.), 3 S. R. 760; 42 Hun, 347; *Yager v. Person* (N. Y.), 3 S. R. 724; 42 Hun, 400.

The fact that plaintiff is an habitual litigant is no ground of impeachment as a witness. *Palmeri v. Manhattan Ry. Co.*, (N. Y.) 14 N. Y. S. 468.

On cross-examination of a plaintiff, proof that she is an habitual litigant is properly excluded, as it does not effect her credibility. *Id.* affirmed; *Palmeri v. Manhattan Ry. Co.* (N. Y.), 30 N. E. 1001; 133 N. Y. 261.

Where the character of a witness is in question, it is improper, on the cross-examination of an impeaching witness, to ask if the witness has any personal knowledge of any particular act of bad conduct on the part of the witness whose character is being assailed. Nor is such testimony competent on the re-direct examination. *Fox v. Commonwealth* (Ky.), 1 S. W. 396.

A witness for defendant cannot be impeached by testimony that he is a confidence man and a thief. *Conway v. State* (Tex. Cr. App.), 26 S. W. 401.

A witness cannot, on cross-examination, for the purpose of impeaching him, be asked as to his having been in jail, etc., as, under Code Civil Proc. § 2051, he cannot be questioned as to particular wrongful acts. *Clements v. McGinn* (Cal.), 33 P. 920.

On a murder trial, evidence as to the character of one of the state's witnesses for peace and quiet is irrelevant, when such witness was in no manner connected with the homicide, though he was with deceased at the time of its occurrence. *State v. Jackson* (La.), 10 So. 600.

Evidence that a witness for the state had the reputation of being a rash, dangerous, and turbulent man when in liquor, is not competent to discredit his testimony. *State v. Nelson* (Mo.), 14 S. W. 712; 101 Mo. 464.

While interrogatories may be allowed for the purpose of showing, to impeach a witness, a plan by which his crimes are to be used to compel him to testify in a certain manner, and an arrangement that, in case he so testifies, he shall not be prosecuted for such crimes, interrogatories directed to establishing his unreliability as a witness because of specific offenses are not competent. *Gilpin v. Daly*, (N.Y.), 12 N.Y. S. 448; 58 Hun, 610; 20 Civ. Proc. R. 91; *Same v. Appleby*, (N.Y.) 13 N.Y. S. 394; 59 Hun, 624.

In an action for libel for sending demands for the payment of a debt through the mail, inclosed in envelopes on which was printed the words "for collecting bad debts," plaintiff was asked, on cross-examination, "How many men in this city did you owe besides defendant?" Held, that the question was incompetent because of its specific nature, instead of being directed to plaintiff's character and reputation. *Muetze v. Tuteur* (Wis.), 46 N. W. 123.

Evidence that witness was "given to rows, and to putting them off on others," is inadmissible, as it does not render witness incompetent for infamy, nor does it impeach his veracity. *Briggs v. Commonwealth*, 82 Va. 554.

Under Code Civil Proc. Cal. § 2051, providing that a witness cannot be impeached by evidence of particular wrongful acts, it is improper to ask a witness, on cross-examination, whether he is not the person who was arrested for beating a woman of the town,

and who appeared, pleaded guilty, and paid a fine therefor. *Jones v. Duchow* (Cal.), 23 P. 371.

On a trial for assault in the first degree, defendant's counsel, for the purpose of impeaching the credibility of the complaining witness, asked him, on cross-examination, whether he had not procured the discharge of thirty workmen, which was proposed to be followed by testimony showing that he had done so by giving false information to their employer. Held, properly disallowed. *People v. Ryan*, (N. Y.), 8 N. Y. S. 241; 55 Hun, 214; 7 N. Y. Crim. R. 448.

On a trial for the unlawful sale of intoxicating liquor, the fact that a witness is in a habit of drinking beer does not affect his credibility, and the admission of evidence of that fact is error. *People v. Kahler* (Mich.), 53 N. W. 826; 93 Mich. 625.

WANT OF CHASTITY.—A male witness cannot be impeached by evidence of his reputation for unchastity. *State v. Coffey*, 44 Mo. App. 455.

The veracity of a male witness cannot be impeached by evidence concerning his general reputation for unchastity. *State v. Clawson*, 30 Mo. App. 139.

Lack of chastity cannot be shown to impeach the credibility of a female witness. *People v. Mills*, 54 N. W. 488; 94 Mich. 630.

The veracity of a female witness cannot be impeached by showing her want of chastity. *State v. Hobgood* (La.), 15 So. 406.

Testimony to show improper relations between the state's witnesses, a man and woman, in order to impeach the woman's testimony, is inadmissible. *People v. Sherman* (Cal.), 32 P. 879.

It is competent, in impeaching the credibility of a witness, to prove her general character bad, without limiting the inquiry to matter of veracity; but it is not permissible to inquire into her virtue and chastity, or to show she is a common prostitute. *McInerny v. Irvin*, (Ala.) 7 So. 841; 90 Ala. 275.

In a prosecution for theft, defendant could not prove by a witness, that she, the witness was a common prostitute, solely for the purpose of disgracing her in the eyes of the jury. *Stayton v. State*, (Tex. Cr. App.) 22 S. W. 38.

The fact that a witness is a prostitute cannot be singled out as a ground for impeaching her credibility. *Rhea v. State* (Ala.) 14 So. 853.

Evidence of bad conduct on the part of the state's witnesses, that a warrant had been issued for their arrest for petit larceny, and that deceased and his wife kept a house of ill fame, was properly excluded. *Vance v. Commonwealth* (Va.) 19 S. E. 785.

In a prosecution for bastardy, the answer of a witness for the

state, on cross-examination, "I do not keep a bawdyhouse," cannot be impeached by evidence of bad character. *State v. Cagle* (N. C.) 19 S. E. 766.

It is proper cross-examination, as bearing on the credibility of a witness, to ask her if she had not kept girls for the purpose of prostitution. *State v. Hack*, (Mo. Sup.) 23 S. W. 1089.

On indictment for rape, defendant's wife, having testified in his behalf, may be asked if she had not lived with defendant before marriage as his mistress. *Exon v. State* (Tex. Cr. App.) 26 S. W. 1088.

When a witness, properly introduced to impeach the reputation for chastity of the prosecutrix in a rape case, has stated positively that he knew her general reputation, his competency is not destroyed because, on cross-examination as to the nature of his knowledge, he states that he has heard ten, fifteen, or twenty persons speak of her character in that respect, and say that it was bad. *State v. Reed*, (La.) 7 So. 132; 41 La. Ann. 581.

The credibility of a witness cannot be impeached by evidence as to her chastity sixteen years before the trial. *Turner's Guardian v. King* (Ky.) 32 S. W. 941.

The woman having testified in behalf of the state, and her chastity and credit having been impeached, it was not error to charge that a witness might be impeached "by proof of general bad character, or by proof of general bad character as to the subject-matter of inquiry," and that a witness "may be sustained, and his credit restored, by proof of general good character or by the proof of general character in respect to the matter or subject of inquiry;" and "whether a witness has been impeached by any of these modes is a question of fact for the jury." *McTyier v. State*, (Ga.) 18 S. E. 140, 91 Ga. 254.

Evidence of the bad character of a witness, sought to be impeached, two years before the trial, is competent. *Davis v. Commonwealth*, (Ky.) 23 S. W. 585.

On a trial for larceny a witness for the people admitted that, though not the wife of defendant, she had been living with him as such, and was so doing when she testified that he committed the offense charged. On cross-examination, to show her bad moral character, she was asked if she had ever been married or ever had a child; if she had not been in a family way in her mother's house, some time ago; and if she did not have a child there. To each question she answered, "No." The court refused to permit any further questions in that line. Held, that the court did not abuse its discretion. *People v. Harrison*, (Mich.) 53 N. W. 725, 93 Mich. 594.

The character of a witness cannot be impeached by showing that he associates with lewd and abandoned women, but the showing must be of such moral turpitude in the witness that no one would be justified in believing his uncorroborated statements. *State v. Jackson*, (La.) 10 So. 600.

A witness cannot be required to testify concerning the immorality of his previous life, where such testimony does not tend directly to prove some issue. *State v. Houx*, (Mo. Sup.) 19 S. W. 35.

In a prosecution for seduction, evidence of specific immoral acts on the part of the girl is inadmissible for the purpose of impeaching her credibility. *State v. Rogers*, (Mo. Sup.) 18 S. W. 976.

A witness whose character it was sought to impeach was confined to prison for the seven years intervening between her residence in another state and the trial. Held, that it was not error to exclude inquiry as to her general moral character at "the present time" in the neighborhood of her residence, evidence of her character at the time of her residence having been given. *Sage v. State*, (Ind.) 26 N. E. 667; 127 Ind. 15.

Where, in a prosecution for assault with intent to rape, the accused has testified on his own behalf, he may be impeached by proof that his general reputation for virtue and chastity is bad. *State v. Shroyer*, (Mo.) 16 S. W. 286.

Where one of the witnesses for the state testifies that he has no fixed habitation or business, but lives in unlawful cohabitation with a woman who worked as a menial servant, and another testifies that his occupation is to "fight, and sometimes shoot a little craps," it is error to charge the jury that proof that a witness has been guilty of gambling, fighting or unlawful cohabitation does not in any manner affect his credibility. *Hollingsworth v. State*, (Ark.) 14 S. W. 41.

Evidence offered by defendant as to the character of the house kept by one of plaintiff's witnesses, and as to the orders of municipal authorities in reference to her, was properly excluded since, although the bad character of a witness may be shown to impeach, the cause producing such bad character cannot be inquired into, unless on cross-examination. *Birmingham Union Ry. Co. v. Hale*, (Ala.) 8 So. 142; 90 Ala. 8.

GOOD CHARACTER TO SUPPORT. Where there is conflict between the evidence of one of defendant's witnesses and a witness for the state, evidence of the good character of the former is properly excluded, where the facts about which there is conflict has no bearing upon the material facts of the case. *Britt v. State*, 17 S. W. 255, 21 Tex. App. 215.

In an action for personal injuries, plaintiff, on his direct examination, may testify as to the occupation and standing of his wit-

nesses, though their character was not assailed by defendant. *Galveston, H. & S. A. Ry. Co. v. Thornsberry*, (Tex. Sup.) 17 S. W. 521.

The state may offer evidence of the good reputation for truthfulness of its own witness, in case his veracity is attacked by defendant's counsel in course of his cross-interrogation. *State v. Frug*, (La.) 10 So. 621.

Where a witness, on cross-examination, admits his conviction and confinement in a penitentiary for a crime involving moral turpitude, the party who called him may establish his good character for truth. *Wick v. Baldwin* (Ohio Sup.) 36 N. E. 671.

Supreme Court of Louisiana.

(Filed December 2, 1895.)

STATE v. THOMPSON.

1. WITNESSES—ACCOMPLICES.

The court again affirms that juries may convict on the testimony, not corroborated, of the accomplice, if they believe his testimony. 1 *Greenl. Ev.* §§ 372, 379; 1 *Archb. Cr. Law*, p. 503; *State v. Prudhomme*, 25 *La. Ann.* 522; *State v. Russell*, 33 *La. Ann.* 138; *Const. art.* 168.

2. SAME.

The decisions in the Callahan and Dudoussat Cases do not trench on previous decisions in reference to accomplices. One of these decisions holds that, if corroboration of the accomplice is attempted, it must be by that species of confirmatory testimony the law exacts in such cases. The other holds that this court will not set aside a verdict on the ground that illegal testimony was admitted to sustain that of the accomplice, when it was an issue of fact, with which the court cannot deal, whether or not the witness was a feigned accomplice or an accomplice at all. *State v. Callahan*, 17 *South.* 50; 47 *La. Ann.* 444; *State v. Dudoussat*, 17 *South.* 685; 47 *La. Ann.* 977; *Const. art.* 81, — limiting the jurisdiction of this court in criminal cases.

Appeal from a judgment convicting defendant of arson.

E. H. McClendon, for appellant.

M. J. Cunningham, Atty. Gen., and James D. Everett, Dist. Atty., for the State.

MILLER, J.—From a sentence for arson, defendant appeals. The judge refused to instruct the jury that the defendant could not be convicted on the testimony alone of an accomplice not corroborated, and this refusal is the subject of the bills of exceptions. The particeps criminis is not, on that account, an incompetent witness. Competency exists until conviction and sentence. Hence it is settled that the accomplice may be used as a witness by the state. In this case the defendant alone was indicted; and even when the participant is jointly indicted with the other, the prosecution as to the accomplice may be withdrawn, to use him as a witness. 1 Greenl. Ev. §§ 372, 379; 1 Archb. Cr. Law, p. 502; State v. Prudhomme, 25 La. Ann. 522; State v. Russell, 33 La. Ann. 135. The testimony of the accomplice being admissible, it has been held by the courts of other states and in Louisiana that the conviction could be had on the testimony alone of the accomplice, without corroboration, if the jury believed his testimony. This conclusion was reached by our courts more readily, perhaps, because our law makes the jury judges of the facts. Const. art. Rev. St. § 991.

It is claimed in argument here that our courts have gone too far in holding that juries may convict on the unaided testimony of an accomplice. While the text writers recognize the infirmity of that species of testimony, and commend the caution judges have enjoined on juries with reference to such testimony, still it is the current of authority that the jury may act on the testimony of the accomplice only, and convict. 1 Greenl. Ev. § 380; 1 Archb. Cr. Law, p. 502; Whart. Cr. Ev. § 441. With us the charge of the judge is restricted to giving the jury the law applicable to the case, leaving to them the determination of the weight due to the testimony. The direction given by judges in other states not to convict on the testimony of an accomplice would be to trench on the functions of the jury here. Const. art. 168; Rev. St. § 991. We think, therefore, that the decisions of our courts on this subject have very respectable support in the text-books and jurisprudence of other states, and are in harmony with our constitution and laws.

It is urged on us that the decisions in *State v. Callahan*, 47 La. Ann. 444; 17 South. 50; and *State v. Dudoussat*, 47 La. Ann. 977; 17 South. 685, respectively, are in conflict with previous decisions. Neither of those decisions exhibits any such conflict. The question in the first case, so far as connected with the present contention, was not whether corroboration of an accomplice was requisite, but the character of confirmatory testimony, if attempted to be offered. The court held that the supposed testimony tendered as corroboration was illegal, and on that ground set aside the verdict. In the *Dudoussat* Case it was held that testimony admissible to confirm the ordinary witness could not be deemed illegal on the assumption it was to support an accomplice, when the issue of fact before the jury was whether the witness was a feigned accomplice or an accomplice at all, — an issue with which this court could not deal. Neither decision expressed or implied that the accomplice must be corroborated. Our jurisprudence on this point, we think, must be deemed settled, and sustains the refusal to charge as requested and that given. *State v. Prudhomme*, 25 La. Ann. 522; *State v. Russell*, 33 La. Ann. 135. It is therefore ordered, adjudged, and decreed that the sentence of the lower court be affirmed, with costs.

BREAUX, J., concurs in the decree.

Supreme Court of Louisiana.

(Filed December 2, 1895.)

STATE v. WILLIAMS.

1. CRIMINAL LAW—INDICTMENT.

The service of a copy of a proces verbal of the action of the jury commissioners in drawing the jury, upon an accused person, is not required.

2. SAME—AMENDMENT.

The indorsement by the grand jury of an indictment as a "thru" bill instead of a "true" bill, is merely error in matter of form, and the court may cause such an indictment, on objection therof, to be forthwith amended.

Appeal from a judgment convicting defendant of murder.

Lawrence H. Pugh, for appellant.

M. J. Cunningham, Atty. Gen., and O. D. Billon, Dist. Atty.
(John Marks, of counsel), for the State.

NICHOLLS, C. J.—Defendant has appealed from a sentence of death, based upon the verdict of a jury found upon an indictment charging him with murder. One of his grounds of complaint is that he was not served with a copy of venire as the law requires, because of the failure of the paper served on him to contain a copy of the “proces verbal of the jury commissioners showing the date of drawing and number of jury commissioners present.” We know of no law requiring the service of a copy of a proces verbal of the action of the jury commissioners in drawing the jury upon an accused person. Section 992 of the Revised Statutes declares simply that: “Every person who shall be indicted for any capital crime, or any crime punishable with imprisonment at hard labor for seven years or upwards, shall have a copy of the indictment and a list of the jury which are to pass on his trial, delivered to him at least two entire days before the trial.”

The other grounds of complaint, though raised at different times and in different forms, all rest upon the correctness or incorrectness of the proposition advanced by him that no “true bill” had been found against him by the grand jury. He contends that “the finding of the grand jury was incomplete, insensible, utterly void, null, and meaningless, and the so-called ‘indictment’ fatally defective by reason of said finding.” From the motions to quash, demurrer, bills of exceptions, motions for a new trial, and motion in arrest of judgment, it would appear that the finding of the grand jury indorsed on the back of the indictment, and signed by the foreman, was written “A thru bill,” instead of “A true bill.” The objection to the finding of the grand jury was first raised by demurrer and motion to quash before trial, but after arraignment. The court overruled the objection, holding that the finding and indorsement were sufficient under the rule of *idem sonans*; but none the less it ordered the clerk of court to enter an order directing

the finding by the grand jury on the indictment to be so amended as to read, "A true bill." The copy of the indictment served upon the defendant was a copy of the indictment as so amended. In the proceeding of the court of September 18, 1894, we find the following minute entry: "State of Louisiana v. Muff Williams. No. 911. Indictment for murder. In this case the grand jury came into open court, and reported the following, viz.: Indictment for murder a true bill. [Signed] L. Himel, Foreman of the Grand Jury." We assume that the original entry (prior to amendment) was: "Indictment for murder a thru bill. [Signed] L. Himel, Foreman of the Grand Jury."

In the first volume of Wharton on Criminal Law ("Principles, Pleading and Evidence"), section 497, the author discusses the subject of the "Finding and attesting of the bill." He says: "The examination being over, it becomes the duty of the grand jury to pass upon the bill. * * * The usual practice is for the foreman to sign the return, and the words 'True bill,' with his name attached, have been frequently considered a good finding, though it was held not an error where the endorsement was simply 'A bill,' omitting the word 'true.' And in some states it has been held sufficient to omit the words 'A true bill' altogether where the signature of the foreman is given. The weight of authority, however, is that the omission of the words 'True bill,' if excepted to before verdict, will be fatal." In *Frisbie v. U. S.* 157 U. S. 163; 15 Sup. Ct. 586, the supreme court of the United States, said: "It is objected that the indictment lacks the indorsement, 'A true bill,' as well as the signature of the foreman of the grand jury. No objection was made on this ground in the circuit court, either before or after the trial. There is in the federal statutes no mandatory provision requiring such indorsement or authentication, and the matter must, therefore, be determined on general principles. It may be conceded that in the mother country, formerly, at least, such indorsement and authentication were essential. 'The indorsement is parcel of the indictment, and the perfection of it.' *King v. Ford*, Yel. 99. But this grew out of the practice there obtained. The bills of indictment or formal accusations of crime were prepared and presented to the grand jury, who, after investigation, either approved or disapproved of the accusation, and in-

dicated their action by the indorsement 'A true bill,' or 'Ignoramus, or sometimes, in lieu of the latter, 'Not found,' and all the bills thus acted upon were returned by the grand jury to the court. In this way the indorsement became the evidence, if not the only evidence, to the court of their action. But in this country the common practice is for the grand jury to investigate any alleged crime, no matter how, or by whom, suggested to them, and after determining that the evidence is sufficient to justify putting the party suspected on trial, to direct the preparation of the formal charge or indictment. Thus, they return into court only those accusations which they have approved, and the fact that they thus return them into court is evidence of such approval, and the formal indorsement loses its essential character. This matter is fully discussed by BEASLEY, C. J., in *State v. Magrath*, 44 N. J. Law, 227, 228; by MONCURE, president of the court of appeals, in *Com. v. Smyth*, 11 Cush. 473, 474,—the latter saying: 'This omission in an indictment is simply the omission of a form, which, if oftentimes found convenient and useful, is in reality immaterial and unimportant.' In each of these cases it was held by the court that the lack of the indorsement was not necessarily, and under all circumstances, fatal to the indictment. In 1 Bish. Cr. Proc. § 700, it is said: 'In the absence of a mandatory statute, it is the better view that both the words "A true bill" and the signature of the foreman may be dispensed with if the fact of the jury's finding appears in any other form in the record.' See, also, *State v. Creighton*, 1 Mott & McC. 256; *State v. Cox*, 6 Ired. 440. In *Gardner v. People*, 3 Scam. 83-87, the court held that the signature of the foreman, though a statutory requirement, would be presumed if the indictment was recorded. Nevertheless, as it is not unvarying rule for the grand jury to return into court only the indictments which they have found, it is advisable at least, that the indictment be indorsed according to the ancient practice, for such indorsement is a short, convenient, and certain method of informing the court of their action. The defect, however, is waived if objection is not made in the first instance and before trial, for it does not go to the substance of the charge, but only to the form in which it is presented. There is a general unanimity of the authorities to this effect. In *State v. Agnew*, 52 Ark. 275;

12 S. W. 563, it was held that a statute requiring an indorsement of 'A true bill,' signed by the foreman, was directory; that objection to a lack of such indorsement was waived unless made before pleading. In *McGuffie v. State*, 17 Ga. 497, while holding that the usual practice of indorsement was advisable, the court said that the objection on account thereof was 'an exception, which goes rather to the form than to the merits of the proceeding,' and too late after trial. See, also, *State v. Mertens*, 14 Mo. 94; *State v. Murphy*, 47 Mo. 274; *State v. Shippey*, 10 Minn. 223 (Gil. 178); *People v. Johnston*, 48 Cal. 549; *Wau-kon-chaw-neek-kaw v. U. S.*, *Morris* (Iowa), 332. In this connection, reference may be made to section 1025, Rev. St., which reads: 'No indictment found and presented by a grand jury in any district or circuit or other court of the United States, shall be deemed insufficient, nor shall the trial judgment or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant.' The indorsement was no part of the charge against the defendant. If no indictment had in fact been found by the grand jury,—in other words, if there was no legal accusation against him,—the defendant should have objected on this ground when the court called on him to plead to this which it assumed to have been properly presented to it. The very fact of pleading to it admits its genuineness as a record. *State v. Clarkson*, 3 Ala. 378, 383. Instead of denying the existence of any legal accusation, the defendant demurred to it on the ground of insufficiency, thus abandoning all question of form, and challenging only the substance."

In the case before this court the record shows that the grand jury reported an indictment for murder in the case of the *State v. Muff Williams*. The indictment was filed in court, and is itself a part of the record. *Pickerel v. Com.* (Ky.) 30 S. W. 617. It charges the defendant with having murdered one Augustin Johnson. He was unquestionably tried and convicted under an indictment found by a grand jury. Defendant's complaint is leveled merely at the word "thru," appearing in the indorsement before the word "bill." The word was evidently intended for the word "true." As written, it was either a slip of the pen, or the mis-

take of a person whose mother tongue probably was not English as to the spelling of the word, or as to the word itself. In this state, under section 1064 of the Revised Statute, every objection to any indictment for any formal defect apparent on the face thereof shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular, and thereupon the trial shall proceed as if no such defect had appeared. The authorities cited show that the objection raised went only to form, and did not reach the charge presented against the accused. The court was authorized to make the amendment it did, and the case properly went to trial. The judgment appealed from is affirmed.

Supreme Court of Mississippi.

(Filed November 4, 1895.)

WILBURN v. STATE.

HOMICIDE—SELF-DEFENSE—INSTRUCTION.

On a trial for homicide in which the defendant, by his evidence on the trial, was attempting, in part, to justify the homicide on the ground of self-defense, an instruction which emasculates the evidence given by the defendant upon the plea of self-defense and then charges upon the weight of the fragments left, is erroneous.

Appeal from circuit court, Tunica county; R. W. Williamson, Judge.

Kinney Wilburn appeals from a conviction of manslaughter. Reversed.

Kinney Wilburn and one Jesse Harris were indicted in Tunica county in 1894 for the murder of one Henry Mitchel. At the September, 1894, term of that court, they were tried, and convicted of manslaughter, and sentenced to the penitentiary. They took an appeal to the supreme court, and the case was reversed

at the October, 1894, term of that court. 16 South. 360. They were again tried at the February, 1895, term of the circuit court of Tunica county, on same indictment, and the jury found a verdict of guilty as charged. On the trial, the evidence, as far as is deemed necessary to give it, was as follows: Wilburn was assisting a constable in his efforts to arrest deceased, against whom Wilburn had made an affidavit charging him with a misdemeanor. They had looked for deceased one day, and had failed to find him. On that day Wilburn was not armed at all. On the next day he armed himself with a Winchester rifle, as did the constable; they having been informed that deceased had said he would kill any two men who attempted to arrest him, and that he would not be arrested, and that he was armed with a pistol. They returned to search for deceased the second day, and, while going through a cotton field, they saw deceased coming towards them, when they squatted down in the cotton, and waited until deceased got in about ten feet of them, when they got up, and Harris, the constable, with the warrant in one hand and his Winchester rifle in the other, commanded him to throw up his hands, and consider himself under arrest. Both Wilburn and Harris testified that, when ordered to throw up his hands, deceased threw his right hand behind him, taking hold of an object in his hip pocket, which they could see, and which appeared to be a pistol, but which he did not draw. Harris did not want to kill deceased, and fearing that if he shot him with his rifle he would kill him, threw it down, and, as he did so, deceased sprung towards it, reaching for it with his left hand, with his right hand still on the pistol handle in his pocket, when Harris drew his pistol and shot him, from the effects of which he died. Defendant was sentenced to the penitentiary for five years, and appealed.

F. A. Montgomery, Jr., and J. B. Cochran, for appellant.

Frank Johnston, Attorney General, for the State.

WOODS, J.—The fifth instruction given for the state is in these words: "To justify the defendant, Harris, on the ground of self-defense, he must have shot the deceased because he believed from some act of the deceased that deceased was about to

kill him or do him great bodily harm, and because he, as a reasonable man, believed that, unless he shot deceased, deceased would, at the time, kill him, or do him great bodily harm. He cannot justify himself merely because deceased threw his hand behind him, because that of itself gave him no right to shoot deceased. Nor can he justify himself merely because deceased was running towards a Winchester rifle (if you believe this), that he (Harris) had just thrown down. He must have honestly and reasonably believed that deceased intended to kill him, or do him great bodily harm, and not merely that deceased intended to resist arrest or intended to flee." The defendant, by his evidence on the trial, was attempting in part, to justify the homicide on the ground of self-defense, by showing that the deceased, at the time of the killing, threw his hand to where he had a pistol on his person, and that he made some effort to draw the weapon, and that defendant then saw the handle and lock of the weapon; and that deceased, at the moment he was shot by defendant, was running towards and reaching over for the rifle which defendant had thrown down; and that deceased fell on being shot, with one of his hands on the rifle. The instruction as asked and given emasculates this evidence offered by the defendant, and then charges upon the weight of the fragments left. For the error above indicated, the judgment is reversed.

Supreme Judicial Court of Massachusetts.

(Filed January 1, 1896.)

COMMONWEALTH v. WALSH.

1. HUSBAND AND WIFE—EXCISE.

A husband is liable for keeping a liquor nuisance when his wife kept intoxicating liquors for illegal sale on his premises and with his knowledge, unless he uses reasonable means to prevent her from carrying out such intent.

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2. SAME.

The criminal intent involved in the commission of such crime is the intent to keep the tenement, knowing and suffering it to be a common nuisance, and it is immaterial who does the other unlawful acts which make it a common nuisance.

Appeal from a judgment convicting defendant of keeping and maintaining a tenement used for the illegal sale and unlawful keeping of intoxicating liquors.

Andrew J. Jennings, Dist. Atty., for the Commonwealth.

James T. Cummings and Charles R. Cummings, for defendant.

KNOWLTON, J.—The only exception argued in this case is to an instruction of the presiding justice to the jury, as follows: If the defendant's wife "kept in the house of her husband, or in the premises which were occupied and controlled by her husband (and if the store was in her husband's house, it would still be under his control), intoxicating liquors for sale in violation of law, then he will be liable therefor under this complaint, if he has knowledge of the fact of her intent, unless he uses reasonable means to prevent her from carrying out such intent; and there is no evidence that this defendant has used or attempted to use such means, nor has he contended that he did so." This instruction was in accordance with the decisions of this court. *Com. v. Barry*, 115 Mass. 146; *Com. v. Wood*, 97 Mass. 225; *Com. v. Kennedy*, 119 Mass. 211; *Com. v. Carroll*, 124 Mass. 30. Upon the hypothesis stated in the instruction, the defendant unquestionably kept the tenement. The tenement was unquestionably "used for the illegal keeping or sale of intoxicating liquor," and therefore, under Pub. St. c. 101, § 6, was a common nuisance. Even if the defendant was ignorant of the illegal use which was being made of his tenement, he was within the terms of the statute which prescribes punishment for a person who keeps a common nuisance. There is a moral, if not a legal obligation upon one in the occupation of real estate, to see that it is not so kept or used as to be a common nuisance; and if this statute were construed like other statutes in regard to the unlawful sale of intoxicating liquor, the

keeper of a tenement which was in fact, under the law, a common nuisance, would be punished, whether he knew of the use which made it a nuisance or not. But if we construe this statute more favorably to persons accused, and hold that an intent to violate the law must be proved, and that a keeper of a tenement is not liable criminally if, while he uses due diligence, his house is a common nuisance by reason of its use for the unlawful sale of intoxicating liquors by a boarder or lodger without his knowledge, it does not relieve the defendant in this case. The question whether a keeper of a tenement is liable criminally for individual acts of unlawful sale of liquors made in his house by his wife from her own property is very different from the question whether he is liable for continuing to keep the common nuisance, if he knows of the unlawful use of his property, and takes no measures to prevent it. Discussions of the question how far a husband is liable criminally for unlawful acts done by his wife in his actual or constructive presence have little relevancy to the question last above stated. When the tenement is the sole and separate property of the wife, and she has such legal control of it as its ownership gives her, it is a question of more difficulty whether he or she keeps it, within the meaning of the statute. Even in such a case it has been held that, if the building is their dwelling house, the husband so far participates in keeping it for an illegal purpose as to make him subject to punishment. *Com. v. Wood*, 97 Mass. 225; *Com. v. Carroll*, 124 Mass. 30. The defendant relies upon *Com. v. Hill*, 145 Mass. 305; 14 N. E. 124. The decision in that case is merely that certain evidence was wrongly excluded, and is entirely consistent with the instruction given in the present case. The discussion in the opinion relates to facts very different from those assumed in the instruction before us. The title to the real estate was in the defendant's wife and the evidence tended to show that the unlawful business was carried on by her on her own account; and the defendant offered evidence that he had "used all reasonable and practicable means in his power to prevent his wife from doing any of the acts charged, and that his wife told him the property was hers, and she should do as she pleased." So far as the language of the opinion tends to modify anything that has been said in previous

decisions, it relates to cases where the punishable act is done by the wife, and the question is whether the husband is liable by reason of coercion or participation, while in the case now before us the husband, and not the wife, was confessedly the keeper of the tenement which was so used as to be a nuisance. The criminal intent involved in the commission of this crime is the intent to keep the tenement, knowing and suffering it to be a common nuisance. It is immaterial who does the other unlawful acts which make it a common nuisance. The keeper's knowledge that it is a nuisance, unaccompanied by active efforts to prevent its being offensive in the eye of the law, is guilty knowledge, which makes him punishable, under the express terms of the statute, for keeping it. In the opinion of a majority of the court, the entry must be: Exceptions overruled.

Supreme Judicial Court of Massachusetts.

(Filed December 31, 1895.)

COMMONWEALTH v. SURLS.

1. CRIMINAL LAW—APPEAL—JURORS.

The accused on appeal cannot assert that the jurors were not sufficiently informed as to the case to be tried to enable them to intelligently answer the questions on their examination, unless it is so stated in his bill of exceptions.

2. SAME,

Upon such examination, it is not error to refuse to put to the jurors questions which add nothing material to the questions already put.

3. CRIMINAL LAW—ABORTION.

To constitute abortion, it is not necessary that the foetus should have had vitality.

Appeal from a judgment convicting defendant of having committed an abortion.

Herbert Parker, Dist. Atty., for the Commonwealth.

J. E. Sullivan and D. F. O'Connell, for defendant.

ALLEN, J.—1. It must now be assumed that the jurors who were examined were informed as to the case about to be tried, so far as to enable them to answer the questions understandingly. If this were not so, the defendant should have so stated in his bill of exceptions. His omission to say anything about it will not enable him to maintain that they did not know.

2. There was no error in refusing to put to the jurors the questions requested by the defendant. They added nothing material to the questions which were put.

3. The averment of pregnancy was unnecessary. Pub. St. c. 207, sect. 9; Com. v. Taylor, 132 Mass. 261; Com. v. Follansbee, 155 Mass. 274, 29 N. E. 471. If, being alleged, it was necessary to prove it, it was not necessary to go further, and prove that the foetus, at the time of the defendant's acts, had vitality, so that in the course of nature it could mature into a living child. Even if the foetus had then ceased to have such vitality, pregnancy would not cease till the woman was delivered. Exceptions overruled.

Supreme Judicial Court of Massachusetts.

(Filed January 1, 1896.)

COMMONWEALTH v. MURPHY.

SAME v. ENOS.

1. CRIMINAL LAW—RAPE.

The crime of having carnal connection with a girl under the age of sixteen years is rape, even though she gives her full consent so far as she is capable of consenting.

2. FEDERAL CONSTITUTION.

Article 8 of the Federal Constitution has no application to crimes against the laws of a state.

3. SAME—CHAPTER 466 OF 1893.

Chapter 466 of the Statutes of 1893 does not inflict a cruel and unusual punishment.

4. SAME—KNOWLEDGE OF AGE.

To constitute the offense prescribed by chapter 466 of the Statutes of 1893, is not necessary to show that the defendant knew, or had good reason to believe, that the girl was under sixteen years of age.

5. SAME—RESPONSIBILITY.

One who intentionally commits a crime is criminally responsible for the consequences, if the act proves different from that which he intended.

Appeal from a judgment convicting defendant of a crime under chapter 466 of Statutes of 1893.

Andrew J. Jennings, Dist. Atty., for the Commonwealth.

H. J. Fuller, for defendants.

KNOWLTON, J.—These cases may be considered together, as substantially the same questions are raised in both of them.

Under Pub. St. c. 202, sections 27, 28, the question whether an indictment for an assault with an intent to commit rape upon a female child under the age of ten years can be maintained, if the child consents to what is done, was very fully considered in *Com. v. Roosnell*, 143 Mass. 32, 8 N. E. 747, and decided in the affirmative. This case must be deemed to have settled the law in this commonwealth in accordance with the weight of judicial opinion, although there is some conflict of authority in other jurisdictions. The several acts in amendment of section 27, above cited, which raise the age of consent by girls to carnal connection, do not assume to change the nature of an offense to which they relate. One who unlawfully, carnally, knows and abuses a female child under the age of sixteen years, is guilty of the same crime, under St. 1893, c. 466, as one who committed the offense upon a child under the age of ten years, when Pub. St. c. 202, § 27, were in force. St. 1886, c. 305; St. 1888, c. 391; St. 1893, c. 466. There is no doubt of the intention of the legislature to treat the crime of having carnal connection with a girl under the age of sixteen years as rape, even if she gives her full consent so far as she is capable of consenting.

The defendants contend that the statute last cited is in conflict with article 8 of the amendments to the constitution of the United States, and of article 26 of our declaration of rights, because it

provides for the infliction of a cruel and unusual punishment. The first of these articles has no application to crimes against the laws of a state. *Com. v. Hitchings*, 5 Gray, 482. Without implying that article 26 of our declaration of rights is applicable to the statute before us, it is clear that the punishment prescribed is not cruel or unusual in kind.

There is some ground for the contention that the statute is a departure from the principles which lie at the foundation of our ancient law in regard to rape, and which justify the treatment of it as one of the most heinous crimes that can be committed. The legislation is different in character from St. 1886, c. 329, and St. 1888, c. 311, which were enacted for the punishment and prevention of seduction. But whatever we may think of the policy of a statute that treats a girl of fifteen years and eleven months old, however mature she may be in body and mind, as if she were incapable of committing the crime of fornication, and subjects a boy of the same age, with whom she joins in sexual intercourse, to a possibility of the same punishment as if he were guilty of murder in the second degree, the legislature is ordinarily the judge of the expediency of creating new crimes, and of prescribing penalties, whether light or severe, for prohibited acts. We cannot say that the punishment prescribed for this offense, when the girl is nearly sixteen years of age, and voluntarily participates in it, is beyond the constitutional power of the legislature to inflict.

The presiding justice was asked to instruct the jury that unless the defendant knew, or had good reason to believe, that the girl was under sixteen years of age, he could not be convicted. How far a mistake of fact in regard to the nature of his act may be availed of by a defendant in a criminal case, is sometimes a difficult question to answer. In general it may be said that there must be *malus animus*, or a criminal intent. But there is a large class of cases in which, on grounds of public policy, certain acts are made punishable without proof that the defendant understands the facts that give character to his act. In such cases it is deemed best to require everybody, at his peril, to ascertain whether his act comes within the legislative prohibition. Among these cases are prosecutions for the unlawful sale of intoxicating liquor, for selling adulterated milk, for unlawfully selling naphtha, for admit-

ting a minor to a billiard room, and the like. *Com. v. Savery*, 145 Mass. 212, 13 N. E. 611; *Com. v. Farren*, 9 Allen, 489; *Com. v. Wentworth*, 118 Mass. 441; *Com. v. Emmons*, 98 Mass. 6; *Com. v. Raymond*, 97 Mass. 567. *Com. v. Connelly*, 163 Mass. 539, 40 N. E. 862. Considering the nature of the offense, the purpose to be accomplished, the practical methods available for the enforcement of the law, and such other matters as throw light upon the meaning of the language, the question in interpreting a criminal statute is whether the intention of the legislature was to make knowledge of the facts an essential element of the offense, or to put upon every one the burden of finding out whether his contemplated act is prohibited, and of refraining from it if it is. The application of this rule to crimes like bigamy and adultery has led to some conflict of authority. *Com. v. Hayden*, 163 Mass. 457, 40 N. E. 846; *Reg. v. Tolson*, 23 Q. B. Div. 168. See *Com. v. Presby*, 14 Gray, 65. The defendants in the present cases knew that they were violating the law. Their intended crime was fornication, at the least. It is a familiar rule that, if one intentionally commits a crime, he is responsible criminally for the consequences of his act, if the offense proves to be different from that which he intended. See *Reg. v. Prince*, L. R. 2 Crown Cas. 154, 175. Exceptions overruled.

Court of Appeals of New York.

(Filed December 19, 1895.)

THE PEOPLE v. McCLURE.

EVIDENCE—RECEIVING STOLEN GOODS.

Upon the trial of an indictment for receiving certain stolen goods knowing them to have been stolen, the rule that it is improper upon the trial of a party for one offense to give proof that he is guilty of another on evidence having no connection with the offense on trial, does not apply to a case where it is difficult, if not impossible, to separate the transaction. So held, where the evidence tends to identify the goods covered by the in-

dictment, and it appears that the proof in reference thereto justifies the inference by the jury that all the goods were taken from the same place, by the same person, at the same time, and were received by defendant from the same person at the same time.

Appeal from supreme court, general term, Third department.

Eugene E. McClure was convicted of receiving stolen goods, and from a reversal by the general term (34 N. Y. Supp. 974) of a conviction the state appeals. Reversed.

Upon the trial, the people were allowed to prove, under the objections of the defendant, that the defendant, McClure, had received and had in his possession, at the time the goods of Little & Co. were recovered, the balance of merchandise stolen from the same car at the same time, and presumably by the same person.

John P. Kelly, for the People.

R. A. Parmenter, for respondent.

O'BRIEN, J.—The indictment in this case charged the defendant with having received certain stolen goods, knowing them to be stolen. The goods were described as cigars, cigarettes, and packages of tobacco, of certain brands. The proof tended to show that this property was stolen from a railroad car while in transit to certain consignees. In the same car were certain dry goods owned by other persons, and consigned to other parties. The proof tended to show that these dry goods were stolen from the same car at the same time, and by the same person, and delivered to the defendant. Both classes of goods were found in the defendant's possession. The learned general term reversed the conviction on the ground that it was incompetent, on a trial of defendant upon the charge of receiving the stolen tobacco and cigars, knowing them to be stolen, to give proof of receiving the stolen dry goods from some other person and at some other time, knowing them to be stolen; that it was improper, upon the trial of a party for one offense, to give proof that he was guilty of another offense, having no connection with the offense on trial. We would have no difficulty in agreeing with the learned general term with

respect to the general principle. We are unable to see, however, that the rule has any application to this case. It was difficult, if not impossible, to separate the transaction. All the goods were in the same car, and the circumstances were such that the jury had the right to find or infer that all were taken therefrom by the same person. All of them were found in the defendant's possession, and when found, the defendant had a long conversation with the police in regard to the matter, which ended in his restoring all the goods to the railroad. The defendant's admissions proved by the police were of such a character as to warrant a finding that the defendant received all the goods at the same time, and from the same person. It is true that the defendant, when on the stand as a witness, gave testimony tending to show that the dry goods were received by him at another time and from another person, but this was not conclusive. The jury had a right to consider the defendant's admissions at the time of the discovery of the goods, and were not necessarily bound by the subsequent narrative. So that the case did not fall within the rule referred to by the learned court below. The people were bound to identify by proof the pails and packages of tobacco found in defendant's possession as those stolen from the car, and if they could show that other goods contained in the same package with the cigars were found in the defendant's possession after the theft, that fact would aid in the identification of the cigars and tobacco. A perfect identification of the dry goods would help an imperfect identification of the other goods, since they were all taken from the same car, and were found in the same place. So that this was not the case of receiving other goods at other times and from other persons, but the proof was sufficient for the consideration of the jury, and the inference could fairly be drawn that the defendant received all the goods from the same time, though his own testimony was to the contrary.

But, while disagreeing with the learned general term in this respect, still I think the judgment was properly reversed, for the reason that the record does not show that the defendant was ever legally convicted or sentenced, but does show the contrary. By section 436 of the Code of Criminal Procedure, the jury in a criminal case may either render a general verdict, or where they

are in doubt as to the legal effect of the facts proved, they may except upon an indictment for libel, find a special verdict. The next two sections define a general verdict to be "Guilty" or "Not guilty," and a special verdict to be that by which the jury find the facts only, leaving the judgment to the court. It must contain the conclusions of fact as established by the evidence to the satisfaction of the jury, and not the evidence to prove them. The next section provides the special verdict must be reduced to writing in the presence of the jury, and agreed to by them before they are discharged, and entered in the minutes of the court. The case before us contains these minutes certified by the clerk and from them it appears that the jury came into court, and delivered the verdict "that they find the prisoner, Eugene McClure, guilty of receiving stolen goods." The four sections following provide for a hearing by the court upon the special verdict, providing, among other things, that upon such hearing the defendant's counsel shall have the right to close the argument. Section 443 provides that, if the facts found by the jury are not sufficient to enable the court to judge whether not the facts import a crime then a new trial shall be granted. The object of these proceedings after the verdict is obtain the judgment of the court upon the question whether the facts found do or do not import the crime charged, and if they do not, then the defendant must be discharged. The verdict in this case being special, no sentence could be pronounced until further proceedings before the court, and on these proceedings the defendant must have been discharged, since the facts found do not import any crime. The facts found constitute but one element of the offense charged, as guilty knowledge that the goods had been stolen is that main ingredient of the crime. In *Miller v. People*, 25 Hun, 473, the jury returned the following verdict: "We find the prisoner guilty of receiving stolen goods knowing them to be stolen." It was held that this was a special verdict, which could not be enlarged by intendment, or held to mean more than it expressed, and as it was not found that he received them feloniously, no crime was found, and the judgment of conviction was reversed. The reasons for this result, and the authorities cited in the opinion, apply with full force to this case. We must take the verdict in this case as it has been certified to

us by the clerk whose duty it was to record it. It cannot be enlarged or changed by any admissions, verbal or written, which the defendant or his counsel made afterwards. When the defendant was sentenced to the state prison, immediately afterwards the only authority that the court had to act upon was this verdict expressed in the very words quoted. When it was entered in the minutes of the court, the defendant was at that moment convicted or not. If he was not then convicted, he could not be afterwards by admissions, however made.

Now, it appears that long after this verdict was rendered, and after sentence passed, the defendant's counsel made a bill of exceptions, in which it is stated, by way of recital of the proceedings, that there was a general verdict of guilty. It was not necessary in the bill of exceptions, to say anything whatever about the form of the verdict. It is perfectly manifest that this statement is nothing more than an erroneous construction by the counsel of the legal effect of the verdict as entered by the clerk, and to hold that such a statement changes or modifies the verdict as certified by the clerk whose duty it was to enter it, or is to be taken as importing verity against the plain terms of the court record, seems to me utterly impossible.

But there is nothing in this case like a formal judgment record. The only judgment that appears is the sentence of the court. In *Messner v. People*, 45 N. Y. 1, this court reversed a conviction in a criminal case where the record failed to show that the prisoner, before sentence, was asked by the court what he had to say why judgment should not be pronounced against him. This was said to be a substantial right, and one of the safeguards which the law gave to the accused, and it was followed in many subsequent cases. *Graham v. People*, 63 Barb. 468. When the legislature came to codify the criminal law, so important did this right seem to them that it was provided, in section 480 of the Code of Criminal Procedure, that when the defendant appears for judgment he must be asked by the clerk, whether he have any legal cause to show why judgment would not be pronounced against him. In this case the importance of observing that provision is obvious. If it had been complied with, the defendant would then have an opportunity to call the attention of the court to the form of the verdict,

and the necessity of further legal proceedings thereon before judgment could be pronounced, and that was the first opportunity that he had to raise the question after the entry of the verdict. If the sentence is to be deemed a judgment, this question remains, for nowhere in the record before us does it appear that the defendant had the benefit of this legal right. Before a person can be deprived of life or liberty, the people are bound to show that every provision of law intended for his benefit or safety has been complied with. The Code also provides what the defendant may show when so asked, in arrest of judgment or otherwise, and it is only after it appears that he has nothing to allege in that regard that the court is permitted to pronounce judgment. For these reasons, I think the general term properly reversed the conviction.

But my brethren do not concur in this last view, but hold that, considering the minutes and their reference to the indictment under which the conviction was had, and the express statement in the bill of exceptions that the jury rendered a general verdict of guilty, this record shows a conviction for the offense charged in the indictment, namely, the receiving of stolen goods with guilty knowledge. This necessarily leads to a reversal of the judgment of the general term, and an affirmance of the conviction.

All concur, except O'BRIEN, J., who dissents from result.
Judgment accordingly.

Supreme Court of Arizona.

(Filed December 23, 1895.)

CURBY v. TERRITORY OF ARIZONA.

1. EVIDENCE—RAPE.

On the trial for rape alleged to have been committed by a father upon his daughter, it is competent to show that complainant's motive in charging defendant was to shield a lover, whose attentions were paid to her against her father's will.

2. SAME—EXAMINATION OF DEFENDANT.

A defendant can only be examined by the prosecution about the matters testified to in his direct examination.

3. SAME—CORROBORATION.

A conviction for rape may be had on the uncorroborated testimony of the victim.

4. SAME—PROOF.

The evidence, in this case, was held to be insufficient to sustain a conviction.

Appeal from district court, Cochise county; before Justice Bethune, Judge.

Joseph Curby was convicted of the crime of rape, and appeals. Reversed.

On May 18, 1894, an indictment was returned, accusing Joseph Curby of the crime of rape, committed January 14, 1894, on Laura Curby. To the indictment, defendant demurred. The demurrer was overruled, and defendant entered a plea of not guilty. The trial was had May 24, 1894. A verdict of guilty was returned, and judgment pronounced thereon, by which defendant was sentenced to the penitentiary for life. Joseph Curby resided in a house at the limits of Tombstone. The nearest dwelling to his was 185 feet away. He was a dealer in second-hand furniture, and had his place of business in the city of Tombstone. He owned an express wagon, which he used in delivering goods, and to ride in, in going to and from his place of business. Laura Curby, the prosecutrix, resided in San Francisco until the first part of the year 1893, when she took up her residence with the defendant. She worked at a dressmaker's in Tombstone for about six months just prior to the date when defendant was arrested. She kept defendant's house, and, after doing up the housework in the mornings, she would go to her work at the dressmaker's, where a number of ladies were employed. On the trial she testified that the defendant assaulted her in his bedroom on Sunday, January 14, 1894, at between eleven and twelve o'clock in the day; that she resisted him to her utmost; that he overpowered her; that she screamed; that he put his hand over her mouth; that while the act was being performed she exclaimed, "Father, have mercy on your own flesh and blood!" that when the act was over she went into her own bed room,

and, when she had recovered from the exhaustion caused by her efforts to prevent the act, she went about the doing of her housework; that from that date down to the 26th day of February, 1894, defendant raped her as often as three times a week, and that she resisted him every time to her utmost; and that at each time, while the act was being performed, she exclaimed, "Father, have mercy on your own flesh and blood!" She testified that she had not reported his conduct to any one, giving as a reason for her silence that she had no friends to whom she could go and report it to, and the further reason that she was afraid he would kill her. For nearly one year Laura Curby resided in the same house with her father, the defendant. Their bedrooms were adjoining, with a door from the one to the other. She kept the house. They made visits together, and received visitors. During that period he attended to his store in the city, and his other business, and she worked six months of the time at the dress-maker's, where several matrons were engaged in business. She rode on defendant's wagon with him, frequently, between their residence and the business house. Their conduct towards each other was marked by no change after the day of the alleged assault from that which existed prior to that date. She testified that he assaulted her in December, 1893, but at that time, she said, "He tried to get the best of me, but did not succeed." On the trial, Mrs. Curby, whose residence is San Francisco, and who is defendant's divorced wife, of sixteen years' standing, was offered as a witness for the prosecution, and only two facts were proved by her, or attempted to be proved: (1) "That Laura Curby is the defendant's daughter;" and (2) "that she is the divorced wife of defendant, of sixteen years' standing." Evidence was introduced to the effect that, after the date of the first rape, Laura requested defendant to purchase for her a diamond ring, and that he suggested to her that a watch would suit her better; that she agreed with him in that suggestion; and that he did purchase her a gold watch and chain, and presented them to her on her birthday, February 22d, just four days before he was arrested on this charge. At the date of the trial, defendant was nearly sixty years old, and he had been a grandfather for over seven years. Laura Curby, the prosecutrix, was eighteen years old. The de-

fendant offered to prove, or attempt to prove, that Laura was prompted in making the charge by a desire to shield her lover, and to punish defendant for interfering with the movements of her lover in his attentions to her; that is, he attempted to prove that she had a motive for instituting the prosecution against him. The court did not allow him to offer such evidence. Defendant was sworn as a witness, and after closing his testimony he was examined by the prosecution, and forced by the court to answer questions propounded to him by the prosecution which were not connected with the matters testified to in his examination in chief. From the judgment of conviction he appeals.

Allen R. English, for appellant.

T. D. Satterwhite, Atty. Gen. (William Herring, of counsel),
for the Territory.

ROUSE, J. (after stating the facts.) It is not necessary to pass upon the action of the court in overruling the demurrer to the indictment, or that we should express an opinion as to the validity of the indictment in this case. Passing those questions, we find defendant was accused of the crime of rape, tried therefor, convicted, and sentenced to the penitentiary for life. Rape is justly considered one of the most heinous crimes. A low degree of moral turpitude must be attained by a man, in order to commit this crime. Against a man who commits this crime, popular indignation is aroused, and exists with the first information that the man is accused of or charged with the offense. Indignation starts with the accusation. The case, in part, is prejudged before an examination is had. Support the charge with the allegation that the victim is the mother, sister, or daughter of the accused, and a trial, unless it be well conducted, is a useless proceeding, for the accused will be condemned before the trial. The sentiment just mentioned gave birth to this expression of an able jurist: "Rape is easy to charge. It is hard to disprove." Care should be used by the court, in all criminal trials, to prevent convictions on prejudice alone. On account of the nature of the crime of rape, in trials therefor, the court should be exceedingly careful. Laura Curby and Joseph Curby, her father, resided in the same dwell-

ing, and had adjoining bedrooms, with a door from one to the other, for nearly twelve months before the time fixed on which the alleged assault was made. Lodging so near each other during all that period, with opportunities for such an assault at hand every night, when an outcry would summon no protector to her defense, the assault was deferred for over ten months. It is alleged that he chose an hour in the daytime, when people were abroad and an outcry would likely attract attention, and on a Sunday (a day on which unusual sounds would be sure to be noticed), to commit the act. After the first act, at intervals of two or three days, it is said, the act was repeated, and that at each time she exclaimed, "Father, have mercy on your own flesh and blood!" That after the completion of the first act she went into her bedroom, and that after she had rested awhile, and recovered from the exhaustion caused by her resistance, she went to work in the doing up of her housework. She rode on defendant's wagon with him, after the performance of some of those acts, to his place of business and elsewhere. After the act she importuned him to purchase her a diamond ring, and he purchased her a gold watch and chain, instead of a ring, and presented them to her on February 22d, her eighteen birthday,—nearly forty days after the alleged assault, and only four days before she made the complaint on which he was arrested. During the period between the day on which the alleged assault was made and the day of his arrest, she worked at the dressmaker's, where there was a number of ladies employed, and went about the city of Tombstone as she had done before that period, and was in company with those she was accustomed to be with. The facts and circumstances in evidence, the age of the accused, the conduct of the prosecutrix after the date of the alleged assault, the nature of the exclamations said to have been uttered by the prosecutrix at the time of the acts, the number of acts alleged to have been had, and the failure of the prosecutrix to make complaint, leads us to the conclusion that no rape was committed. Remove from this case the fact that Laura Curby is defendant's daughter, and no one familiar with the nature of the crime would, from the evidence in the case, believe defendant guilty of this crime. This case must be consid-

ered as though she was not related to him. If he committed the act with force, against her consent, it was rape. If he committed the act with her consent, it was incest. He is guilty of rape, or not guilty of anything, on this indictment. On the trial the prosecution seemed anxious to prove the relationship of the parties, and lost no opportunity to establish that fact. Mrs. Curby, who lives in San Francisco, and who is defendant's divorced wife, was introduced by the prosecution as a witness, apparently for no other purpose than to prove that Laura is his daughter, and the further fact that she is defendant's divorced wife of sixteen years' standing. At least, no other facts were attempted to be established by that witness. Defendant attempted to show that the prosecutrix was actuated, in making the charge against him, by a motive, and to show that the motive was to shield a lover of hers, whose attentions were paid to her against her father's consent. This the court did not permit. We think the court erred in its rulings in that respect. It is competent to show in every criminal prosecution, the motives of the prosecuting witnesses. Their motives are to be considered by the jury, in order to determine the question of the guilt or innocence of the accused. Especially is the motive of the injured woman, in a charge of rape, material to be shown and considered. The prosecution propounded to defendant questions about matters not testified to in his direct examination, and he was compelled to answer those questions. A defendant can only be examined by the prosecution about the matters testified to in his direct examination. Pen. Code, par. 2040.

Counsel for appellant contends that a conviction for rape cannot be had on the uncorroborated testimony of the woman ravished; that her evidence alone is not sufficient; that Laura Curby was not corroborated by any other witness in the case, and for that reason the defendant should be acquitted. We cannot give our assent to that contention. Corroboration is not necessary or required, as a rule. It is required only in cases in which the prosecuting witness occupies, in some degree, the status of a *particeps criminis*. The woman, who is ravished, commits no crime by that act. Of all persons, she is the most unfortunate. She is entitled to the sympathy of society, and in her interest the scales

of justice should be speedily adjusted. Evidence of the victim alone, in a charge of rape, is sufficient to convict; but as "rape is easy to charge, and hard to disprove," great care should be exercised, on a trial of one accused of this crime, to prevent a conviction on prejudice alone, on account of the prejudice which exists against the crime itself. It must be established by evidence that the victim was ravished; she must be overcome with force, which she has not the power to resist in an honest effort to do so, or be compelled to yield by threats of violence, which, if executed, would endanger her life; and she must, in good faith if of the age of discretion, believe her assailant has the power at that time to carry the threats into execution, and will do so immediately on her refusal to obey. She must resort to every reasonable means at hand, if of the age of discretion, to prevent the act, and yield not as long as she can discover an avenue through which she may make her escape. She cannot be neutral or passive. If she is, she will be in *pari delicto*, and it will not be rape. If, after the first act is accomplished, it be repeated at intervals, and the woman is of the age of discretion, and has the opportunity to make complaint, and she makes none, or if she consents to an act after the first intercourse, such conduct will be evidence that the first act was performed with her consent, and that she was not ravished. We do not think the evidence sufficient to sustain the judgment. The judgment is reversed and the case dismissed, and it is ordered that the defendant be released from the penitentiary, and that for that purpose the proper writ be issued.

BAKER, C. J., and HAWKINS, J., concur.

BETHUNE, J. (specially concurring in the reversal of the judgment). In this case I concur in the opinion that the judgment should be reversed, on the ground of errors committed by the trial court. I do not concur in the judgment discharging the defendant, but think the case should be sent back to the trial court for a new trial. I think the trial court erred in not permitting certain testimony offered by defendant, but I am not prepared to say that the evidence adduced at the trial was insufficient to convict the defendant, but think the jury should be permitted

to judge that. I do not agree with my brethern that this case must be considered as though the prosecutrix was not related to defendant. I think the fact that she is his daughter, taken in connection with the surrounding circumstances, would make a material difference in considering the lapse of time between the first commission of the offense, and her telling of it, and her apparent passive submission to subsequent commissions. With shame to our civilization be it confessed, there are not wanting instances of rape by fathers upon their daughters, and the existence of that relation puts a different phase upon a case like the one under consideration and ordinary cases of rape. The prosecutrix testified that she was in mortal fear of her father, and that he was rough and harsh to her, and threatened to kill her if she told on him. "Where a father has established a kind of reign of terror in his family, and his daughter, under the influence of dread and terror, remains passive while he has connection with her, he may be found guilty of rape." *Reg. v. Jones*, 4 Law T. (N. S.) 154. And again: "Where the defendant had intercourse with a fourteen-year-old step-daughter, in her bed, in a room where three younger children were sleeping; she told him not to get into bed, and threatened to tell her mother, but made no outcry, and no complaint for six days,—it was held, that under the circumstances, a conviction of rape must be sustained." *Bailey v. Com.*, 82 Va. 107. All these matters of evidence, I think, should be left to the consideration of the jury, with proper instructions from the court, and opportunity being given the defendant to show any motive the prosecutrix may have in bringing the charge, which latter was not done in this case. For that reason, I think the judgment should be reversed and a new trial granted.

Supreme Court of Utah.

(Filed December 9, 1895.)

PEOPLE v. GLASSMAN.**1. LIBEL—JUDICIAL PROCEEDINGS.**

Where a reporter, or an editor, or a publishing company becomes the defendant in a prosecution for libel, based on a publication referring to evidence produced in the judicial proceeding, the defendant will be permitted to introduce the testimony to which such publication referred for the purpose of showing that the publication, or any portion thereof, is a fair and true report of such testimony, and, if this is shown, the publication is so far privileged that no malice will be inferred from the mere fact of publication.

2. SAME.

In such event, in order to convict, the prosecution must affirmatively show express malice on the part of the defendant.

3. SAME—MALICE.

To rebut malice, any mitigating circumstances, or such as show a justifiable motive, may be admitted, and likewise any evidence tending to show that the charges in a libelous publication are true.

4. SAME—CANDIDATE FOR OFFICE.

Every candidate for public office is amenable to public and private criticism, made in good faith, and based upon reasonable or probable cause.

5. SAME.

A newspaper has the same right, as a private individual, to discuss the character and qualifications of a candidate for office conferred by vote of the people, being responsible for an abuse of the right.

6. SAME—MALICE.

Where the prosecution has introduced evidence, which tends to show that the publication was made maliciously, it is competent for the defendant to rebut such evidence, and free themselves from the imputation of malice, by showing not only upon what evidence the publication was made, but also the circumstances under which it was made, the sources of their information, and the facts tending to show the motives which induced the publication, to enable the jury to pass upon the question whether or not the publication was in fact malicious, as being made in bad faith, or without probable cause.

7. TRIAL—INSTRUCTION.

Where the court, by its declarations, in the presence of the jury, and its instructions to them, determined that the defendant is guilty, it is error.

Appeal from a judgment convicting defendants of a criminal libel.

L. R. Rhodes, J. D. Murphy, and Miner & Hiles, for appellants.

W. L. Maginnis, Asst. U. S. Atty., for the People.

BARTCH, J. — The defendants were indicted for libel, convicted, and sentenced each to pay a fine of the sum of \$500, and the defendant Glassman, in default of payment of fine, to be imprisoned until the same was paid. A motion for a new trial was overruled, and thereupon an appeal was prosecuted to this court, and many errors assigned. The indictment, among other things, charges that the defendant Glassman was the editor of a certain newspaper called the Standard, and that the defendant publishing company was the owner of the said newspaper; that on the 30th day of October, 1894, the said company unlawfully, willfully, and with malicious intent to injure one L. R. Rogers, did write and publish a false, scandalous, malicious, and defamatory libel of and concerning the said L. R. Rogers. The alleged libelous article charges, substantially, that L. R. Rogers is not a fit and proper person to be elected a member of the constitutional convention, and in support of this position refers to the record in a criminal case—the trial of one Borel for the murder of one George Lewis. The article states that Lewis, a “sure thing” man, deliberately stole from Borel, who was a sheep herder, \$1,600, by means of a certain game of chance; that Rogers had been acting as attorney for Lewis; that Borel was induced to employ Rogers, and pay him a fee of twenty-five dollars, with the understanding that Lewis would be arrested, and the money returned; and that Borel brooded over the matter, became insane, and killed Lewis. The article also refers to Borel’s testimony at the trial, and to the fact that it was published in the Standard at that time, and stated that Rogers could have had Lewis arrested and confined, and averted the murder, but, instead of that, Borel was arrested, and confined under bond as a witness. The article further charges that when Rogers was prosecuting attorney six or seven men were arrested for criminal trespass, some of whom were his clients, and were

discharged without hearing the prosecuting witness or investigating the case; that a certain woman of New Orleans, for whom he managed some business concerning an estate, wrote letters to certain business men in Ogden, which did not show him a model administrator. The article then asks the people to defeat Rogers in the election for members to the constitutional convention, in order that dishonesty and corruption may be repudiated. The colloquium in the indictment recites that the article imputed to Rogers that when he was prosecuting attorney he was guilty of misfeasance and malfeasance in office, and that, when his friends or clients were charged with crime, he was guilty of dishonest and unprofessional practices, and failed to do his duty as an officer under oath, and was guilty of unprofessional and dishonest conduct in relation to the estate regarding which the letters were written by the woman in New Orleans.

The first question raised in the bill of exceptions which it is deemed necessary to consider is whether the court erred in refusing to allow the witness Gatrel, court stenographer, to read, on the part of the defense, from his stenographic notes, the testimony of Eugene Borel, given on the trial for the murder of Lewis, on the subject of the employment of Rogers by Borel to recover his money, of which he claimed Lewis had robbed him, and as to what Rogers did in the matter. It appears that this testimony was offered for the purpose of rebutting malice, and to show that the alleged libelous article, in so far as it related to the subject of Borel's testimony, given in open court, in the case of *People v. Borel*, was a true and fair report thereof. This was material, because, if said article contained a fair and true report of such testimony, and was published in good faith, without malice, it was privileged under the statute which provided that "no reporter, editor, or proprietor of any newspaper is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall not be implied from the mere fact of publication." Comp. Laws Utah 1888, § 4495. Clearly, this statement is broad enough to include the evidence of witnesses adduced in a judicial proceeding, for such evidence consists of state-

ments made in the course of such proceeding. A newspaper may, therefore publish a "fair and true report" of the evidence produced in a judicial proceeding, being liable for such publication only when the same is made maliciously, for the purpose of injury. It follows as a necessary consequence that if a reporter, or an editor, or a publishing company becomes the defendant in a prosecution for libel, based on a publication referring to such evidence, such defendant will be permitted to introduce the testimony to which such publication referred, for the purpose of showing that such publication, or any portion thereof, is a fair and true report of such testimony; and, if this be shown, then the publication is so far privileged that no malice will be inferred from the mere fact of publication; and, in such event, in order to convict, the prosecution must affirmatively show express malice on the part of the defendant. The burden of showing that the publication was made with malicious intent is thus cast upon the prosecution, and as to whether or not malice did actually exist becomes a question of fact for the jury, to be determined from all the evidence admitted on the trial. It appears that the prosecution realized the rule of law applicable under the circumstances disclosed by the bill of exceptions in this case, for, in addition to the alleged libelous publication, it introduced in evidence other publications and statements, in making out its case, tending to show malice. The prosecution having done this, the defendant unquestionably had the right to negative malice, and to show that the alleged libelous publication was a fair and true report of the testimony of Borel, given in the judicial proceeding to which such publication referred. For these purposes the evidence in question was proper and material, and, Borel, being without the jurisdiction of the court, the stenographer who took the evidence referred to was a competent witness. In every case where a publication is made the foundation of a criminal action for libel, malice is an essential ingredient, and therefore any evidence which tends to show a want of malice is admissible. So, to rebut malice, any mitigating circumstances, or such as show a justifiable motive, may be admitted, and likewise any evidence which tends to show that the charges contained in a libelous publication are true, because, if a publication defamatory in character is found to be false, it is itself evi-

dence of a malicious intent, and such evidence may be admitted for the purpose of repelling the legal inference of malice, even though it be insufficient in justification. *Comp. Laws Utah* 1888, § 4492; *Cooley, Torts* (2d Ed.) 257; *White v. Nichols*, 3 How. 266; *Kennedy v. Holborn*, 16 Wis, 457; *Holt v. Parsons*, 23 Tex. 9; *O'Donaghue v. McGovern*, 23 Wend. 25.

It is further complained that in the course of the trial the court sustained an objection of the prosecution to the following question, propounded to the witness Glassman, one of the defendants, by his counsel: "I will ask you to state to this jury upon what evidence the publication was made in the *Standard* respecting the Borel and Lewis affair." On what ground the objection was based does not appear from the bill of exceptions. It does appear therefrom, however, that the question was asked for the purpose of showing that the publication complained of was not made with a malicious intent, and it is therefore insisted that it was competent, and that the sustaining of the objection was error. The evidence shows that the prosecuting witness, L. R. Rogers, was a candidate for the office of member of the constitutional convention. He was thus seeking to assume the duties of a high public office, in which the public had the gravest and most serious concern. In sustaining the objection the court remarked, in the presence of the jury, that a candidate for office offered his character to the public to the "extent that private communications may be made in regard to him." From this statement the natural inference would be that that an editor or manager of a newspaper had no right to investigate the character and qualifications of a person who presented himself as a candidate for office, conferred by the people, and publish the result of such investigation, if it contained anything defamatory, without rendering himself liable for libel, no matter how corrupt or unfit such candidate might be to be intrusted with public interests. This we do not conceive to be the law, for the rule appears to be well settled by an unbroken line of authority that every candidate for public office is amenable to public and private criticism, made in good faith, and based upon reasonable or probable cause; and when a person becomes such candidate he is regarded in law as putting his character in issue

in respect to his qualifications and fitness for the office for which he is a candidate. This rule is founded in public policy, which demands that the conduct, qualifications, and fitness of persons seeking public positions of trust and confidence shall be subject to criticism, upon proper occasion, from proper motives, because the community has a right, and it is to his interest, to know the character, habits, mental and moral qualifications of its public servants. Undoubtedly, for this reason, the freedom of the press was intended to be secured, and a newspaper has the same right as a private individual to discuss the character and qualifications of a candidate for office conferred by vote of the people, being responsible for an abuse of the right; and not until such abuse occurs does a publication become an offense against the laws. Likewise in public policy is founded the rule which forbids a publication of what is false against a candidate for such office, because it may deceive the community, and lead to the rejection of the most worthy and competent persons, to the injury of the public service; and so a publication which is true, if made with malicious intent, and to defame another, is in violation of law. In Cooley, *Torts* (2d Ed.) p. 256, the eminent author, after stating what the liberty of the press implies, says: "The freedom of the press was undoubtedly intended to be secured on public grounds, and the general purpose may be said to be to preclude those in authority from making use of the law to prevent full discussion of political and other matters, in which the public are concerned. With this end in view, not only must freedom of discussion be permitted, but there must be exemption afterwards from liability for any publication, made in good faith, and in the belief in its truth, the making of which, if true, would be justified by the occasion. There should consequently be freedom in discussing, in good faith, the character, the habits, and mental and moral qualifications of any person presenting himself, or presented by his friends, as a candidate for a public office, either to the electors or to a board or officer having power of appointment." This doctrine is very clearly stated in *Com. v. Clap*, 4 Mass. 163, by Mr. Chief Justice Parsons, as follows: "When any man shall consent to be a candidate for a public office conferred by the election of the people, he must be considered as putting his character in issue, so far as it may re-

spect his fitness and qualifications for the office. And publications of the truth on this subject, with the honest intention of informing the people, are not libel; for it would be unreasonable to conclude that the publication of truths, which it is the interest of the people to know, should be an offense against their laws.

* * * For the same reason the publication of falsehood and calumny against public officers is an offense most dangerous to the people, and deserves punishment, because the people may be deceived, and reject the best citizens, to their great injury, and, it may be, to the loss of their liberties." Newell, Defam. §§ 134, 135; *Belknap v. Ball*, 83 Mich. 583; 47 N. W. 674; *White v. Nichols*, 3 How. 266; *Crane v. Watters*, 10 Fed. 619; *Jackson v. Pittsburg Times* (Pa. Sup.) 25 Atl. 613; *Marks v. Baker*, 28 Minn. 162; 9 N. W. 678; *Sweeney v. Baker*, 13 W. Va. 158, 183; *Wheaton v. Beecher*, 66 Mich. 307; 33 N. W. 503; *Mott v. Dawson*, 46 Iowa, 533. The same doctrine appears to prevail in England, for there communications made to persons in the discharge of some public or private duty, whether legal or moral, concerning candidates for office, or affairs where the interests of the public are concerned, are privileged, unless express malice is shown. 2 Kent. Comm. 22; Newell, Defam. §§ 141, 142; *Fairman v. Ives*, 5 Barn. & Ald. 642; *Rex v. Burdett*, 4 Barn. & Ald. 131; *Woodward v. Lander*, 6 Car. & P. 548; *Lewis v. Walter*, 4 Barn. & Ald. 605. It is evident that the prosecuting witness in the case at bar, when he became a candidate for office, offered his character to the public so far as his qualifications and fitness for the office were concerned; and the publication on which the indictment was founded, though defamatory, having criticised and challenged the qualifications and fitness of such candidate, belongs to that class of privileged communications which is protected, if made in good faith, and upon reasonable and probable cause, and without malice. In such case malice is not presumed. Comp. Laws Utah 1888, § 4497. Hence the prosecution having introduced evidence which tended to show that the publication was made maliciously, it was competent for the defendants to rebut such evidence, and free themselves from the imputation of malice, by showing not only upon what evidence the publication was made, but also the circumstance under which

it was made, the sources of their information, and the facts tending to show the motives which induced the publication, to enable the jury to pass on the question whether or not the publication was in fact malicious, as being made in bad faith, or without probable cause. Some of the charges contained in the publication having been based upon the testimony in the Borel trial, the witness Glassman should have been permitted to answer the question under consideration, because it related to the source of information, and tended to elicit facts material in the determination of the question of malice by the jury. *Wilson v. Fitch*, 41 Cal. 363; *Bailey v. Publishing Co.*, 40 Mich. 251; 1 *Ersk. Speech*. (High, Ed.) 160-208 et seq.

In further defining its position in sustaining the objection just considered, the court used the following language, as appears from the bill of exceptions: "Now, then, the defendant in this case, or the defendants in this case, are charged with publishing certain matters with respect to a citizen of this town, which is libel. It is libelous by its terms, and charges not only crimes, but charges matters which are intended to make a man infamous and ridiculous in the eyes of the community," It is insisted that by the use of this language the court declared the defendant guilty of the offense charged, in the presence of the jury, before the case was submitted to them. That such a strong expression of the views of the court, within the presence of the jury, in relation to the character of the publication which was the foundation of the indictment, and the thing which it was the province of the jury to determine, was unfortunate, must be conceded, because it doubtless conveyed to the jury the fact that, in the opinion of the court, the matter contained in the publication was a libel. If this were so, then the only question to be determined by the jury, in order to convict, would be whether the defendants made the publication. Under these circumstances it is impossible to say that the declarations of the court which would at once dispose of the question of malice—the real issue in the case—did not prove disastrous to the defendants by prejudicing the minds of the jury against them. Especially is this so when such declarations are considered in connection with certain language used in the charge of the court in respect to the character of the publication, which

language is as follows: "If the matter is false, and not shown to be true, there can be no justification for it. There is none in a case of this character." The court having previously refused to allow the witness Glassman to state upon what evidence the publication was based in relation to the Borel affair, the defendants were unable to show the material facts upon which they relied in justification; and therefore the opinion of the court, expressed in the presence of the jury, that the publication was a libel, was rendered yet more prejudicial to their rights by the instruction that there was no justification in a case of this character. In effect, the court, by its declarations in the presence of the jury, and its instruction to them, determined that the defendants were guilty. This was error, because it was an invasion of the province of the jury, who were sole judges of guilt or innocence.

We do not deem it necessary to discuss the other questions raised in the bill of exceptions, since it is apparent from those already considered that the defendants are entitled to a new trial. The judgment is reversed, with directions to grant a new trial.

MERRITT, C. J., concurs.

KING, J.—This case is reversed upon three grounds. I agree with the majority of the court in the judgment of reversal, and with the views expressed in the question first discussed in the opinion, but I dissent from the conclusions of my brethren reached in the two remaining questions considered by them.

1. The record does not disclose whether or not the publication alleged to be libelous purports to have been made upon the authority of another. For the purpose only of disproving malice may a defendant in a case of this character show that he was not the author of the publication, and all of the authorities unite in expressing the view that evidence of this character is only admissible when the publication itself indicates that it was made upon the authority of another. The question, "State upon what evidence the publication was made in the Standard respecting the Borel and Lewis affair," would be proper, and the answer thereto admissible, if the defendant, when publishing it, had stated the

"evidence" upon which the publication was based, and the information upon which it was founded. This question was discussed at some length in the case of *Fenstermaker v. Publishing Co.* (just decided by this court), 42 Pac. —, and the view here taken was there announced as the law, and I think the numerous authorities here cited unerringly indicate the erroneous position taken by the majority of the court in this case upon this proposition.

2. During the progress of the trial frequent discussions arose between the court and counsel respecting the admissibility of testimony. While these discussions were in the presence of the jury, they were not for the jury. The court stated to counsel that: "The defendants in this case are charged with publishing certain matter with respect to a citizen of this town, which is libel. It is libelous by its terms, and charges not only crimes, but charges matters which are intended to make a man infamous and ridiculous in the eyes of the community." This, together with one of the sentences of the charges of the court, viz.: "If the matter is false and not shown to be true, there can be no justification for it; there is none in a case of this character,"—is held to be reversible error. There was no complaint that the court persistently during the trial made statements calculated to influence the jury and prejudice them against defendants, and I do not think that the statement made in answer to arguments made by counsel respecting legal propositions was sufficient, even in connection with the words quoted from the charge, to constitute error. I concede the trial court ought to be cautious in their expressions concerning the vital points of the case in the presence of the jury, but it is impossible for the court to answer various questions raised by counsel, and intelligently decide upon objections raised, without expressing views upon material questions; and especially is this so in a case of this kind, where the publication is libelous per se, and where the publication is admitted, and the only defense is justification. Moreover, the legal and technical discussions ensuing between court and counsel are lost to the jury, and from the record in this case I cannot see that defendants were in any manner prejudiced by these statements.

Supreme Court of Oregon.

(Filed December 30, 1895.)

STATE v. THOMPSON.

1. **INDICTMENT—LARCENY—BAILEE.**

An indictment, which charges that defendant, being "the bailee and trustee" of a note, the property of another, embezzled and converted it to his own use, charges but one crime and that crime under section 1800 of the Code.

2. **CRIMINAL LAW—LARCENY—IDENTITY.**

Where the identity of a note offered in evidence is unquestionable, a variance, in the indictment, of two days in the date thereof is immaterial.

3. **SAME—COLLATERAL ATTACK.**

On a prosecution for larceny by a bailee, objection cannot be made to the regularity of the appointment of the guardian who made the demand, where the court making the appointment has jurisdiction of the subject-matter and the parties.

4. **SAME—PROOF OF VALUE.**

Where a note is negotiable and at the time of its conversion is not due, the fact that the defendant was able and did sell and dispose of it for its face is sufficient proof of its value.

5. **SAME—OWNERSHIP.**

A purchaser of land, who agreed to pay, as part of its consideration, a note of the vendor secured by a mortgage on the land, is, on payment thereof, entitled to its possession, and the owner thereof, within the averment of an indictment charging one to whom it was delivered as attorney of the payee, and who converted it to his own use, with the crime of larceny by a bailee.

Appeal from a judgment convicting defendant of the crime of larceny.

B. P. Welch, for appellant.

C. M. Idleman, Atty. Gen., and W. T. Hume, Dist. Atty., for the State.

BEAN, C. J.—The defendant was tried and convicted of the crime of larceny by bailee, under an indictment charging that on the 14th day of June, 1794, the defendant, being "the bailee and trustee of a certain promissory note, dated on the 18th day of

February, A. D. 1889, signed by F. F. Jancke, and for the sum of three hundred and seventy-five dollars, and made payable to the order of E. W. Cressy, of the value of three hundred and seventy-five dollars, the personal property of J. F. Broetje," did feloniously embezzle, and unlawfully convert the same to his own use, etc. From the judgment rendered upon such conviction, he appeals; assigning error in overruling his demurrer to the indictment, and in the admission of testimony by the trial court. The undisputed facts in the case are that in June, 1894, application was made to the county court of Clackamas county for the appointment of a guardian for one F. W. Cressy, who was old and feeble in mind and body, and incapable of taking care of himself. At this time Cressy, who was the owner of considerable property, was in possession of a certain promissory note in his favor, for \$375, dated February 16, 1889, executed by F. F. Jancke, and secured by a mortgage, but which had in fact been paid by one Broetje, who had purchased from Jancke the mortgaged premises, and, as a part of the consideration therefor, had assumed and agreed to pay the note in question, and for that purpose had become a party thereto. Soon after the application for the appointment of a guardian, and the service of a citation upon him, Cressy suddenly disappeared from his usual place of abode, leaving among his effects several promissory notes and mortgages; among the number being the note above referred to, upon which this prosecution was based. On the 14th of June, and after the disappearance of Cressy, a son of the proprietor of the house where he had been staying, acting upon the advice of a neighboring justice of the peace, delivered these notes and mortgages, for safe-keeping, to the defendant, who was, or claimed to be, attorney for Cressy, and took his receipt therefor as such attorney. A few days afterwards one Hungerford, who was appointed guardian of the person and estate of Cressy by the Clackamas county court, demanded of the defendant possession of the notes and mortgages which had been so delivered to him, but without avail. Defendant, being thereupon cited by the county court to appear and answer concerning the property which had been intrusted to him, denied having possession of the same, and claimed that he had redelivered it to Cressy. But in November following he demanded

payment of the note in question from Broetje, and was informed by him that it had been paid to Cressy, who failed to surrender it because, as he said, it had been lost. Thereafter the defendant, notwithstanding his knowledge of such payment and the appointment of a guardian for Cressy, procured his indorsement on the note, which was not yet due, and sold it for about its face value, and appropriated the money to his own use. After the sale of the note he was again required by the county court, on petition of the guardian, to appear and answer concerning the same, which he did, and upon examination said he did not know what had become of the note; that he left it lying on his office desk, and it disappeared in some manner unknown to him, and he did not know where it then was; that he never received anything for it, directly or indirectly, and knew nothing concerning it. Subsequently, on the trial of an action against Broetje by the purchaser of the note, defendant, who was a witness, testified that he had loaned Cressy some money on the note, and had an interest in it to that extent. There can be no possible doubt of defendant's guilt, on the facts; and, unless the record discloses some error affecting a substantial right, the judgment should be affirmed. We shall therefore proceed to notice briefly the alleged errors.

The objection to the indictment is untenable. It is in the language of the statute, and does not charge more than one crime. The word "trustee," as used therein, does not affect its validity, or charged a crime under section 1800 of the Code.

The variance between the note offered in evidence and the one described in the indictment was not material. "The strictness of the ancient rule as to variance between the proof and the indictment," says Earl, J., "has been much relaxed in modern times. Variances are regarded as material because they may mislead a prisoner in making his defense, and because they may expose him to the danger of being again put in jeopardy for the same offense." *Harris v. People*, 64 N. Y. 148. The variance in this case could present no such difficulty. The indictment does not undertake to set out the note according to its tenor, but only in substance and legal effect; and the difference of two days in the date alone could not have misled the defendant in making his defense, and will not

expose him to the danger of again being put in jeopardy for the same offense. The identity of the note described in the indictment and the one offered in evidence is unquestionable, and the judgment in this case will protect the defendant from another prosecution for the same offense, and this is all the law requires. *Donovan's Appeal*, 41 Conn. 550.

The objection to the regularity of the proceedings of the county court of Clackamas county in appointing a guardian for Cressy is without merit in this case. The only object of the proof of such appointment was to show a legal demand upon the defendant for the possession of the note in question. The county court had jurisdiction of the subject-matter and the parties, and it is immaterial for the purposes of this case whether the proceedings in the appointment of the guardian were regular or irregular. It made an appointment and issued letters of guardianship to Hungerford, who duly demanded the note of the defendant, in order that it might be delivered to Broetje, the owner; and this would, no doubt, have been sufficient to establish the conversion, if proof of demand was necessary, which may be well doubted, as the undisputed evidence shows an actual conversion and fraudulent application of the note and its proceeds to the defendant's own use, contrary to the terms of the bailment. *State v. New*, 22 Minn. 76; *Com. v. Hussey*, 111 Mass. 432.

It is also claimed that the state failed to prove that the note was of any value, or that it was the property of Broetje, as alleged in the indictment. The note was negotiable, and at the time of its conversion by the defendant not due, and the fact that he was able to and did sell and dispose of it for its face is sufficient proof of its value. Broetje, having paid Cressy and thus discharged his obligation, was entitled to possession of the note, and was therefore the owner, within the averments of the indictment.

There are several other assignments of error discussed in defendant's brief, but they proceed on the mistaken theory that the same rules as to the indictment and proof prevail in prosecutions for larceny by bailee and for embezzlement, under the statutes of this state, and therefore require no further consideration. A careful examination of this record has failed to disclose any error affecting a substantial right, and the judgment must therefore be affirmed.

Court of Appeals of New York.

(Filed December 19, 1895.)

PEOPLE v. WIMAN.**1. CRIMINAL LAW—FORGERY—INTENT.**

Criminal intent is essential to constitute the crime of forgery, and the testimony bearing thereon is always a question for the jury.

2. SAME.

The conviction should be reversed where the charge renders uncertain the question as to whether "criminal intent" was essential to constitute the crime of forgery.

Appeal from a judgment of the general term of the supreme court, reversing the conviction of defendant.

John D. Lindsay, for the State.

Benjamin F. Tracy, for respondent.

PER CURIAM.—It appears that Robert G. Dun, Arthur J. King, Robert D. Douglass, and the defendant, Erastus Wiman, were associated together in business, carrying on a mercantile agencies under the names of R. G. Dun & Co., and Dun, Wiman & Co., in various cities of the United States and Canada. Wiman was the principal business manager, and had the power to sign the company's name to checks that were necessary to be drawn in the conduct of the business. On the 6th day of February, 1893, the company was owing one E. W. Bullinger the sum of about \$15,000, and on that day the defendant directed a clerk in the company's office to draw a check to the order of Bullinger for \$5,000, upon the Chemical National Bank, to be paid to Bullinger on account of the money owing to him. A check was accordingly filled out by the clerk, and that amount charged to the account of Bullinger on the books of the company. The defendant took the check, signed the company's name thereto, and on the same day, without the knowledge or consent of Bullinger, indorsed Bullinger's name on the back of the check, and then, after indorsing his own name thereon, deposited it to his own credit in the

Central National Bank. The check was subsequently presented to the Chemical National Bank, and was paid, and a few days thereafter it was brought to the attention of the defendant's associates in the business. It further appears that at this time the defendant had overdrawn his account with the company in an amount upwards of \$150,000, and that his associates had forbidden him to draw more from the business on his own account, except a stipulated sum, agreed upon, per month, until the amount of the overdraft should be restored or made good. The defendant was subsequently accused of the crime of forgery in the second degree by an indictment charging him with having feloniously forged on the back of the check the indorsement of E. W. Bullinger, with intent to defraud, and in another court he was charged with uttering the same. Upon the trial court withdrew from the jury all questions with reference to the intent to defraud Bullinger or the Chemical National Bank, and submitted only the question of the intent to defraud R. G. Dun & Co. The claim is made that the transaction set forth does not constitute the crime of forgery. Upon this question our minds are not in accord, and inasmuch as other facts may appear in the event that we should again be called upon to review this case, we have not thought it advisable to enter upon a discussion of the question at this time.

During the summing up of the defendant's counsel, he was interrupted by the court, and a conversation ensued, after which the defendant's counsel stated that he should asked the court to charge the jury "that if the defendant believed that under the rules of commercial law he had legal authority to make this check and indorsed it as he did, the crime is not forgery." The court replied that he should refuse to so charge. Subsequently the court did charge, on the request of the counsel, that "if the jury shall find that Wiman believed that, under the rules of law applicable to commercial paper, he had legal authority to use the name of a person as payee to whom it was not intended that the check should be paid, and to indorse such name on the back of the check, indorsement is not forgery." The court was also requested by the defendant's counsel to charge that, "unless the jury find that the acts charged were committed with criminal in-

tent, the defendant is entitled to an acquittal." The court replied: "I charge you, unless the act was committed with intent to defraud as I explained it to you, the defendant is entitled to an acquittal. I refuse to charge as requested." To this ruling an exception was taken by the defendant. During the summing up of the defendant's counsel, the judge was asked how he would charge upon the subject of criminal intent, and he replied: "I shall charge that the jury must find that there was intent to defraud; nothing about criminal intent." In the charge the judge instructed the jury that there must be an intent to defraud in order to constitute the crime of forgery, and then defined the term defraud, "to deprive of right, either by obtaining something by exception or artifice, or by taking something wrongfully, without the knowledge or consent of the owner." Criminal intent is essential to constitute the crime, and the testimony bearing thereon is always a question for the jury. *Duffy v. People*, 26 N. Y. 588-593; *Stokes v. People*, 53 N. Y. 164; *People v. Powell*, 63 N. Y. 88; *People v. Flack*, 125 N. Y. 324; 26 N. E. 267. It follows that the court should have charged as requested. It is urged, however, that the refusal to so charge did no harm, and that the charge as made sufficiently covered the ground. But we are all of the opinion that the charge as made taken in connection with the remarks of the court and its refusal to charged as requested, was confusing, and rendered uncertain the question as to whether "criminal intent" was or was not essential in order to constitute the crime.

The judgment of the general term should be affirmed.

All concur.

Judgment affirmed.

Supreme Court of Mississippi.

(Filed November 4, 1895.)

SANDERS v. STATE.

CRIMINAL LAW—DEFENDANT'S FAILURE TO TESTIFY—COMMENTS ON.

Comment by the state's counsel on the failure of the accused to testify, under § 1741 of the Code, is ground for reversal.

Appeal from a judgment convicting the defendant of a criminal defense.

Kimmons & Kimmons and Stone & Lowrey, for appellant.

Frank Johnston, Atty. Gen., for the State.

COOPER, C. J.—The judgment in this case must be reversed, and a new trial awarded, because counsel for the state, in his argument before the jury, commented upon the failure of appellant to testify. The statute expressly declares that “the failure of the accused, in any case, to testify shall not operate to his prejudice or be commented on by counsel.” Code, § 1741. It is true the court promptly rebuked counsel, and directed the jury to disregard the fact alluded to, and that counsel then asked that his remarks be considered as withdrawn; but, as we have heretofore decided, this did not cure the error. *Reddick v. State*, 16 South. 490. As was there said: “The statute forbids absolutely any comment on the failure of the accused to testify, and it is the right of every person charged with crime to insist that he enjoy this statutory immunity from criticism by hostile counsel; and the disregard of this plain statute, and of the decisions of this court upon it, by the state's own counsel, must reverse the judgment appealed from in this case.”

Reversed.

Supreme Court of Mississippi.

(Filed November 4, 1895.)

STATE v. JOLLY.

INDICTMENT—PERJURY.

An indictment for perjury, which charges that defendant, while on trial on a certain date, before a designated court, having jurisdiction, under an indictment for unlawfully selling liquor, and while a witness under oath, administered by the duly-authorized clerk of said court, falsely swore that he did not on a certain date sell spirituous liquors, knowing it to be false, the same being a material issue in the case, is sufficient under section 1363 of Ann. Code.

Appeal from circuit court, Chickasaw county; Newnau Cayce, Judge.

S. J. Jolly was indicted for perjury, and from a judgment sustaining a demurrer to the indictment, the state appeals. Reversed.

The indictment was as follows: "On the 18th day of October, 1894, in the second district of Chickasaw county, state of Mississippi, a certain issue was joined between the state of Mississippi and S. J. Jolly, upon an indictment against said Jolly for unlawfully selling vinous and spirituous liquors, in the circuit court of the second district of Chickasaw county, of which cause the said court had jurisdiction, and that on the said day, at the regular October term of the circuit of said district, held at the court house thereof, by the Hon. Newnau Cayce, circuit judge of said court, who was by law authorized to hold said court, the said issue and cause between the state of Mississippi and said S. J. Jolly came on to be tried in due form of law by a jury of the said second district in that behalf duly taken and sworn between the said parties; and upon the said trial upon the issue aforesaid the said S. J. Jolly did then and there appear and tender himself as a witness in his own behalf, and was received to give evidence on behalf of himself, the said Jolly; defendant aforesaid, and that the said Jolly did then, before the said court, take his corporal oath, and was then duly sworn by L. F. Baskin, the clerk of said court, who by law was authorized to administer said oath; that the evidence he, the said Jolly, should give to the court and the jury sworn the parties aforesaid, touching the matters in question in said issue, should be the truth, the whole truth, and nothing but the whole truth; and thereupon on the trial of the said issue, it became and was a material question and matter in the same, whether the said Jolly did, on September 22, 1894, in the second district of Chickasaw county, state of Mississippi, sell vinous and spirituous liquors, and that thereupon the said Jolly, being so sworn as aforesaid, devising and intending to cause and procure a verdict to pass for him, did then and there, to wit, on the said October 18, 1894, upon the trial aforesaid, before the said court and jury, falsely, feloniously, willfully, knowingly, corruptly, and wickedly, and by his own proper act and consent, upon his oath

aforesaid, depose, swear, give evidence to the jury so sworn as aforesaid, amongst other things, in substance and effect, following,—that is to say, that he, the said Jolly, did not sell vinous and spiritous liquors in the second district of Chickasaw county, state of Mississippi, on the 22nd day of September, 1894, whereas in truth and in fact the said S. J. Jolly did, on September 22, 1894, in the second district of Chickasaw county, state of Mississippi, sell vinous and spirituous liquors, all of which he, the said Jolly, well knew; and so the grand jurors aforesaid, upon their oaths aforesaid, do say and present that the said Jolly, on the trial of the said issue, on the day and year aforesaid, and before the court aforesaid, falsely, maliciously, wickedly, knowingly, corruptly, and feloniously, in manner and form as aforesaid, did commit willful and corrupt perjury, against the peace and dignity of the state of Mississippi.” A demurrer was interposed to this indictment upon the following grounds: “The indictment does not allege that the indictment was found by grand jury of the second district of Chickasaw county, upon which said Jolly was tried. The indictment does not set up the indictment, or some part of it, that Jolly was tried upon, on which the alleged false swearing was done. The indictment does not allege to whom Jolly sold liquor. It does not allege that he sold it to any one. Because the indictment does not allege that the indictment upon which Jolly was tried was ever found by any grand jury, and returned into court. It does not charge that the indictment was a legal and binding indictment. It does not show that the issue joined was upon a valid and binding indictment. It does not allege that he knew at the time that he was swearing falsely. It does not sufficiently set the indictment upon which Jolly was tried to identify the case. It fails to allege at what time, or in what court, said indictment was found and returned into court. It does not allege that it was found and returned into court by the grand jury of the second district of Chickasaw county. The indictment upon which Jolly was tried was an invalid indictment, and did not charge any offense against him.” The demurrer was sustained by the court. The state appealed.

Frank Johnston, Atty. Gen., for the State.

T. J. Buchanan, Jr., and W. D. Frazee, for appellee.

WHITFIELD, J.—The indictment was sufficient, under section 1362, Ann. Code, 1892. Judgment reversed, demurrer overruled, and cause remanded for further proceedings.

Supreme Court of Mississippi.

(Filed November 4, 1895.)

BERTRAND v. STATE.

INTOXICATING LIQUORS—DRUGGIST.

A druggist, who in good faith sells tincture of ginger as a medicine, cannot be convicted of selling intoxicating liquors because the buyer diluted the drug with water, and drank it as an intoxicant.

Appeal from a judgment convicting plaintiff in error of selling intoxicating liquors.

Thos. Brady and R. H. Thompson, for appellant.

Frank Johnston, Atty. Gen., for the State.

WHITFIELD, J.—The test question in this case was whether the essence or tincture of ginger in this case was a medicine, sold by appellant to Davis as such in good faith, and not as a beverage, or whether it was a sham preparation, disguised as medicine, really an intoxicating liquor, sold as a beverage. If the former, appellant should have been acquitted; if the latter, convicted. The learned court below excluded the testimony of Dr. Stevens and Dr. Gillis, the appellant's license and certificate of registration as a druggist, and refused, among others, instructions numbered one and three, to the defendant, and charged the jury, for the state, that if they believed from the evidence that appellant sold essence of ginger, and that it, when diluted with water, and drank to excess, would produce intoxication, they

should convict appellant, wholly ignoring appellant's motive in the sale, and whether, when sold, it was a medicine, known and recognized as such, and incapable in its then state of being used as a beverage. The learned judge excluded all proof that it was a standard medicine, prepared according to a standard formula laid down in the United States dispensatory, and used by physicians throughout the United States as a medicine in their practice. Appellant testified that he so made it, and never sold it otherwise than as a medicine. The state's witnesses testified that it could not be used, as bought, as a beverage, but that by diluting it sufficiently with water it would, if enough of it were drank, produce intoxication. The appellant was a duly-licensed druggist. The appellant also offered to prove by Dr. Stevens, a practicing physician, that there were a great many other official tinctures used by practicing physicians in the United States, which, if diluted with water, and drank to excess, would produce intoxication; and this was excluded. The court refused defendant's instruction No. 1, propounding the proposition that, "if the jury believed from the evidence that defendant sold tincture of Jamaica ginger as a medicine, in good faith, and believed further from the evidence that the same was prepared by the directions of the United States dispensatory, and that the same was recognized by the medical profession of the United States," they should acquit. This charge substantially was approved in King's Case, 58 Miss. 740, as we think, correctly. The true rule is there announced with great clearness, the court saying: "One authorized to sell medicines ought not to be held guilty of violating the laws against retailing, because the purchaser of a mixture containing alcohol misuses it, and becomes intoxicated; but, on the other hand, these laws cannot be evaded by selling as a beverage intoxicating liquors containing drugs, barks, or seeds which have medicinal qualities. If the other ingredients are medicinal, and the alcohol is used as a necessary preservative or vehicle for them, if from all the facts it appears that the sale is of the other ingredients as a medicine, and not of the liquor as a beverage, the seller is protected; but if the drugs or roots are mere pretenses of medicines, shadows and devices under which an illegal traffic is to be conducted, they will be but shadows when interposed for protec-

tion against criminal prosecution." The same test, in equally clear cut language, is laid down in *Ramsdell's Case*, 130 Mass. 68, 69; *State v. Haymond*, 43 Am. Rep., at page 789; and in a multitude of other cases. See 11 Am. & Eng. Enc. Law, p. 573 et seq. We refer especially to the masterly opinion of Mr. Justice Brewer, now of the United States supreme court, in *Intoxicating Liquor Cases*, 25 Kan. 751. From *King's Case*, 58 Miss. 737; *Ramsdell's Case*, 130 Mass. 68; and authorities *supra*,—it is obvious that the issue in the case—the test question above set forth—was not submitted to the jury.

The instructions one and three asked by the appellant should have been given; the instruction for the state, framed to present this issue, and the testimony referred to above as offered by the appellant, should have been received; and the jury thus, under proper instructions as to the real issue they were to try, left to respond on these charges and the facts, as the very truth of the matter might appear. Reversed and remanded.

Supreme Court of Alabama.

(Filed November 14, 1895.)

MURPHY v. STATE.

1. CRIMINAL LAW—EVIDENCE—GOOD CHARACTER.

In rebuttal of evidence of good character, the state is not allowed to prove, by a deputy sheriff, "that he nearly always had a warrant for the defendant's arrest."

2. SAME—IMPEACHMENT.

A conviction of a felony cannot be proved in the first instance by parol.

3. APPEAL—OFFER TO PROVE.

Where a party states to the court certain facts which he proposes to prove by a witness, some of which are legal and others are inadmissible, the court does not commit a reversible error by sustaining an objection to the introduction of the facts as an entire statement.

4. SAME—REASONABLE DOUBT—GOOD CHARACTER.

Good character cannot be dissociated from the other facts in the case by referring to it alone as being sufficient to generate a doubt; good character of the defendant is a fact in the case, in the light of which the other facts must be weighed.

5. APPEAL—INSTRUCTION.

The court commits no error in refusing charges requested by a party which are mere repetitions of charges already given at his request.

6. CRIMINAL LAW—HOMICIDE.

Where the defendant fires the shot which results in the death of the deceased, or is an accomplice of the party who commits the deed, though the shot may be intended for a different person, the offense, in the eyes of the law, is the same as it would be if the shot had killed the person for whom it was intended.

7. CRIMINAL LAW—INSTRUCTION.

Though a party is entitled to an acquittal if the jury have a reasonable doubt of his guilt, arising out of any part of the evidence, upon consideration of the whole evidence, a charge is misleading which instructs the jury that the defendant is entitled to the benefit of any reasonable doubt they may have as to the existence of any material fact in evidence.

Appeal from circuit court, Baldwin county, W. S. Anderson, Judge.

John Murphy was convicted of murder, and appeals.

On the trial of the cause, as is shown by the bill of exceptions, the state introduced evidence tending to show that Ed. Cameron was killed by being shot with a gun on May 24, 1884, about eight o'clock at night, in his store, in Baldwin county, Ala.; that the shot was fired from the outside of the building, from a musket, through a window in the building; that about dusk on the day of the shooting the defendant was seen near said store with a musket in his hand, and was heard to say, "I'll get revenge if this musket will go off before daylight;" that the defendant voluntarily admitted to several persons, at different times and places, that he fired the shot which killed Cameron, while in company with one Jim Early; that defendant was a young man, about nineteen or twenty years of age, at the time of the killing; that the deceased and defendant was always friendly; and that the defendant intended to shoot one John D. Cameron, the father of the deceased, who was present at the time of the killing. The defendant introduced evi-

dence tending to show that at the time Cameron was killed the defendant was a small boy, about fourteen years of age, and was staying at the house of Jim Early; that up to the time of the killing of Cameron the general reputation of the defendant was good; and that his general character for peace and quiet was good. The defendant, as a witness in his own behalf, testified that on the evening of the killing he was compelled by Early, who carried a musket to accompany him to Cameron's store; that Early was a dangerous and desperate man, and would not allow the defendant to leave him on his way to the store, although requested to do so, and the defendant was afraid of him; that Early fired the shot that killed Cameron, and that he (the defendant) did not know, up to the time they got to the store, where Early was taking him, or what Early intended doing; that defendant took no part in the killing of Cameron, and was present by compulsion and under duress from Jim Early; and that at no time, while with Early could he get away from him. On cross-examination of the defendant as a witness he was asked "where he came from to attend the trial of this cause." The defendant objected to this question on the ground that it called for irrelevant and incompetent evidence, and duly excepted to the court's overruling his objection. The defendant answered that he came from the coal mines, where he had been serving a sentence under conviction for burglary. The defendant moved the court to exclude this answer on the ground of its immateriality and incompetency, and because its tendency was to prejudice the defendant's cause. The court overruled the objection, and the defendant duly excepted. Charles Hall, a witness for the state, testified that he was formerly a deputy sheriff of Baldwin county, and that he knew the defendant, and "nearly always had a warrant for defendant's arrest." The defendant objected to the part of the testimony of this witness, as quoted above, as being irrelevant and incompetent, and duly excepted to the court's overruling his objection. Upon defendant's introducing a witness, and asking him to state "whether or not he had a conversation with Jim Early shortly after the killing of Cameron, and if so, what did Early say about the killing of Cameron, if he said anything?" the state objected to the question, and

the court sustained the objection. Thereupon the defendant stated, to the court that he expected to prove by the witness that Jim Early himself shot Cameron, and that Murphy was only present at the time of the shooting because he was compelled to accompany Early, and that he (Murphy) did not take any part or interest in said killing, and that Cameron had poisoned Early's dog, and had hired men to kill Early." The court refused to allow the question to be asked, or to allow this evidence to be admitted, and the defendant excepted to this ruling of the court. Upon the introduction of all the evidence the defendant requested the court to give the following written charge: (1) "The good character, alone, of the defendant, prior to the time when Mr. Cameron was killed, if proved, may, when taken in connection with the other evidence in the case, be sufficient to authorize the jury to acquit the defendant." The bill of exceptions recites: "The court had already, in addition to its general charge on the evidence, given the following special charge, in writing at the defendant's request: 'Good character, alone, when taken in connection with the other evidence in the case, may be sufficient to create a reasonable doubt of the defendant's guilt, when, without good character, there would be no reasonable doubt.' " The court refused to give this charge asked by the defendant, and the defendant duly excepted. Among the other charges asked by the defendant, and to the refusal to give each of which the defendant separately excepted, were the following: (2) "If the jury entertain a reasonable doubt as to the truth or falsity of any material fact constituting a part of the testimony in a criminal case, the defendant is entitled to the benefit of such doubt, no matter how slight may be its influence." (3) "The court charges the jury that if they have a reasonable doubt of the defendant's guilt, arising from any part of the evidence, they must acquit the defendant." (4) "Before the jury can find the defendant guilty of murder in the first degree, they must believe from the evidence beyond all reasonable doubt, that the defendant fired the fatal shot, not in self-defense, which resulted in the death of the deceased, willfully deliberately, maliciously, and premeditatedly, intending at the time that he fired the fatal shot that it should result in the death

of the deceased." (5) "Although you may believe beyond a reasonable doubt that Murphy committed the crime with which he stands charged, yet if you further believe beyond a reasonable doubt that he was compelled to do it by fear of death or great bodily harm from Early, and he had no way to escape from doing it without being in danger of death or great bodily harm, the defendant would not be guilty in either degree." (6) "A crime may be committed under duress, or under a sense of fear of death or of great bodily harm; and if you believe from the evidence, beyond all reasonable doubt, that Murphy committed the crime, and you further believe that he did it under duress, or fear of great bodily harm or death from another, and he had no reasonable way of escape from such duress, the defendant would not be guilty." (7) "If the jury believe from the evidence that Murphy, the defendant, merely accompanied or was with Early when the homicide was committed, and they further believe that Early fired the fatal shot which killed Cameron, they cannot find Murphy guilty of murder in either degree, unless they further believe, beyond a reasonable doubt, and to a moral certainty, that Murphy aided, abetted, or encouraged Early to kill Cameron." (8) "The court charges the jury that the mere presence of another at the time one commits the crime of murder would not make another guilty of any offense, unless the jury believe, beyond a reasonable doubt, and to a moral certainty, he knew the murder was going to be committed before it was committed, and aided, abetted, or encouraged its commission." (9) "If the jury believe from the evidence that the defendant was simply or merely present at the time Cameron was killed, by the request of Jim Early, and that Early killed Cameron, and that the defendant was present under duress or fear of Early, and that he had no opportunity to escape from being present from the time that he got with Early until the commission of the alleged murder, he (Murphy) would not be guilty of any offense under this indictment, and it would be the duty of the jury to so find."

Samuel B. Browne, for appellant.

W. C. Fitts, Atty. Gen., for the State.

COLEMAN, J.—The defendant in the court below was convicted of murder, and sentenced to the penitentiary. On the trial the defendant offered evidence of good character. In rebuttal, we presume, of the evidence of good character, the state was allowed to prove, against the objection of the defendant, by a deputy sheriff, "that he nearly always had a warrant for the defendant's arrest." This evidence was clearly illegal, and should have been excluded. A warrant in the hands of an officer for the arrest of another establishes no fact affecting the general reputation of the party to be arrested, and good character cannot be impeached by such evidence.

A defendant who avails himself of the right to testify in his own behalf may be cross-examined generally, and be compelled to disclose all facts within his knowledge which could be elicited if he was merely a witness, and not a defendant, material to the issue, and is subject to all legal questions which may affect his credibility. It is competent to show, for the purpose of affecting his credibility, that a witness has been convicted a felony (and a defendant who has been examined is subject to this rule); but the court record of his conviction, or a properly certified copy thereof, is the primary evidence to establish the fact. It cannot be proven by parol evidence in the first instance. *Thompson v. State*, 100 Ala. 70; 14 South. 878; *Thomas v. State*, 100 Ala. 53; 14 South. 621.

When a party states to the court certain facts which he proposes to prove by a witness, some of which are legal, and others are inadmissible, the court does not commit a reversible error by sustaining an objection to the introduction of the facts as an entire statement. Counsel offering the evidence should separate the legal from the illegal, and have the court rule separately as to each fact, and reserve his exception.

The proper rule for framing charges relative to good character is stated in *Goldsmith v. State* (Ala.) 16 South. 933; *Johnson v. State*, id. 99; *Scott v. State*, id. 925; *Newsom v. State* (Ala.) 18 South. 206. Good character cannot be dissociated from the other facts in the case by referring to it alone as being sufficient to generate a doubt, any more than a similar reference could be made to any other fact in evidence. Under our rule, good character of

the defendant is a fact in the case, in the light of which the other facts must be weighed. The fact of good character may generate a reasonable doubt, when without this fact the jury might be satisfied beyond a reasonable doubt of guilt. The same may be true of other facts in the case. The rule does not authorize the framing of a charge in such way as to give undue prominence to the fact of character, any more than to any other fact in the case.

It is well to keep in mind the rule declared in the case of Railroad Co. v. Hurt, 101 Ala. 34, 13 South. 130, where it is held that the court commits no error in refusing charges requested by a party which are mere repetitions of charges already given at his request; and a mere variation in the use of words, which does not change the meaning in any respect, or application of the principles asserted, does not affect the rule. Smith v. State, 92 Ala. 30, 9 South. 408.

We would also direct attention to the rule declared in the case of Arp v. State, 97 Ala. 5, 12 South. 301, where a defendant, being tried for murder, attempts to justify the taking of the life of an innocent person under the plea of duress. If the defendant fired the shot which resulted in the death of the deceased, or was an accomplice of the party who committed the deed, although the shot may have been intended for a different person, the offense, in the eyes of the law, is the same that it would have been if the shot had killed the person for whom it was intended. Clarke v. State, 78 Ala. 474. It seems from the evidence that the deceased was the person at whom the fatal shot was fired. Jackson v. State (Ala.) 17 South. 333.

Although a party is entitled to an acquittal if the jury have a reasonable doubt of his guilt, arising out of any part of the evidence, upon consideration of the whole evidence, a charge is misleading which instructs the jury that the defendant is entitled to the benefit of any reasonable doubt they may have as to the existence of any material fact in evidence.

We are of the opinion that the principles declared and authorities cited will furnish sufficient guide to the court and counsel for the defendant on another trial. Reversed and remanded.

NOTE ON REASONABLE DOUBT

RULE AS TO REASONABLE DOUBT CORRECTLY APPLIED.—The rule that, in criminal cases, the defendants are entitled to the benefit of a reasonable doubt, applies not only to the case as made by the prosecution, but to any defense interposed. *People v. Riordan*, (N. Y.) 26 St. Rep. 531; 117 N. Y. 73. If, taking the whole case together, the evidence for the prosecution and the evidence respecting the defense, the jury have any doubt of the guilt of the prisoner, they must acquit. *People v. Stone*, (N. Y.) 27 St. Rep. 823; 117 N. Y. 480. See *People v. Downs*, (N. Y.) 34 St. Rep. 262; 123 N. Y. 558.

It is the duty of the trial judge, on the trial of a criminal action, to instruct the jury, clearly and ungrudgingly, in behalf of the defendant that, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. *People v. Stephenson*, (N. Y.) 66 St. Rep. 566; 32 Supp. 1122. Not only must the guilt of the defendant follow as the only conclusion of reason before a conviction may be had, but, in addition to that, if a reasonable doubt follows, a conviction may not be had. *Id.* The term "beyond reasonable doubt," seems to be even stronger than "conclusively." *Id.* In a criminal action, the jury may not convict because on the whole they are reasonably certain of guilt. *Id.* On the contrary, to convict, they must be without a reasonable doubt, even though there is a clear preponderance of evidence on the side of guilt. *Id.*

The question of reasonable doubt is always one for the jury under proper instructions from the court. *People v. Davis*, 46 Rep. 214. When there is evidence upon which the jury might, or might not, entertain rational doubt, it is not for the court on appeal to say that the jury should have doubted and have given the defendant the benefit of such doubt by his acquittal. *Id.*

The phrases "beyond a reasonable doubt," and "to a moral certainty," are the legal equivalents of each other. *Jones v. State* (Ala.), 14 So. 772.

Proof of guilt beyond all reasonable doubt is necessary to authorize a conviction in trials for misdemeanors, as well as for felonies. *Vandeventer v. State* (Neb.), 57 N. W. 397.

This rule is not applicable to an action for a penalty, in which the people is the party plaintiff. *People v. Briggs*, (N. Y.) 22 St. Rep. 317; 114 N. Y. 65.

Where the court charges the doctrine of reasonable doubt generally, making it applicable to the whole case, an objection that it was not applied in the instructions on threats and self defense is

untenable. *Powell v. State* (Tex.), 13 S. W. 599; 28 Tex. App. 393.

A charge is not objectionable for failure to instruct that reasonable doubt should be applied as between the several degrees of homicide charged upon, where the court applies the reasonable doubt to the whole case, and no additional instructions on the subject were requested. *Hall v. State* (Tex.), 12 S. W. 739; 28 Tex. App. 146.

A correct charge on reasonable doubt, as to the whole case and all the evidence, is sufficient; and it is not incumbent upon the court to carve the case or the evidence into different propositions, and apply the rule of reasonable doubt to one or more of them severally. *Carr v. State* (Ga.), 10 S. E. 626; 84 Ga. 250.

An instruction that, if a fair examination of all the evidence raises a reasonable doubt in the minds of the jury as to defendant's guilt, they should acquit him, is proper, as defining reasonable doubt. *State v. Perigo*, (Iowa) 45 N. W. 399.

An instruction to the effect that it is not necessary in order to to convict, that every fact be proven beyond a reasonable doubt, if, on the whole of the evidence, there is no reasonable doubt of the guilt of the defendant, is proper. *Weaver v. People* (Ill.), 24 N. E. 571.

It is not error to charge that if the jury have any reasonable doubt of defendant's guilt, they "can" give him the benefit of it. *Heron v. State*, 22 Fla. 86.

A charge that a reasonable doubt "is not a mere possible doubt; it should be an actual or substantial doubt; it is such a doubt as a reasonable man would seriously entertain; it is a serious, sensible doubt, such as you could give a good reason for," is correct. *State v. Jefferson* (La.), 10 So. 199; 43 La. Ann. 995.

Where the definition of a "reasonable doubt," as given in the charge of the court, has been repeatedly approved, if a defendant wants a more satisfactory one he should ask for it. *People v. Winters* (Cal.), 28 P. 946; 93 Cal. 277.

It is proper to charge that it is not necessary that the jury should believe that every material fact in evidence has been proven beyond a reasonable doubt, but that it is sufficient if they believe that every material allegation in the indictment, or either count thereof, in manner and form as therein stated and charged, has been proven beyond a reasonable doubt. *Jamison v. People* (Ill. Sup.), 34 N. E. 486.

The rule requiring a conviction to rest on evidence supporting it beyond reasonable doubt, does not require the evidence to be free from conflict. *Godard v. People*, 42 Ill. App. 487.

An instruction that, "in considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. *Painter v. People*, 35 N. E. 64; 147 Ill. 444. A doubt, to justify an acquittal, must be reasonable, and it must arise from a candid and impartial investigation of all the evidence in the case, and, unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. *Id.* A charge that, if after considering all the evidence, you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt," correctly states the law, and the mistake in punctuation in putting a period, instead of a comma, after the word "pause," is harmless error, since it could not mislead the jury. *Painter v. People*, 35 N. E. 64; 147 Ill. 444.

It is not true that, if the jury have any doubt as to which grade of homicide accused has committed, they should give him the benefit of the doubt, and find him guilty of the lesser grade, but only a reasonable doubt will work this consequence. *Jackson v. State (Ga.)*, 18 S. E. 298; 91 Ga. 271.

An instruction that defendants should not be convicted so long as any juror entertains a reasonable doubt of their guilt should be given. *Parker v. State (Ind. Sup.)*, 35 N. E. 1105.

It is not enough that the jury "believe from the evidence," certain facts in order to convict; they must be convinced beyond a reasonable doubt." *Green v. State*, 15 So. 242; 97 Ala. 59.

If the jury have any reasonable doubts upon any facts which are necessary to convict the defendant, he is entitled to be acquitted. *People v. Guidici*, (N. Y.) 100 N. Y. 503; 3 N. Y. Cr. 558.

In order to convict, the guilt must be established beyond a reasonable, not beyond a possible, doubt. *People v. Riley*, (N. Y.) 3 N. Y. Cr. 374.

A reasonable doubt, as to any element of the crime, entitles the defendant to an acquittal. *People v. Willett*, (N. Y.) 36 Hun, 500.

This rule is applicable in respect to the degree of the crime charged, and to every essential requisite of that degree. *Id.*

If the jury has a reasonable doubt as to the truth of any one of the defenses, there is a reasonable doubt whether defendant's guilt is satisfactorily shown, and he is entitled to an acquittal. *People v. Downs*, (N. Y.) 26 St. Rep. 122; 7 N. Y. Cr. 481; 56 Hun, 11; 8 N. Y. Supp. 524.

The benefit of a reasonable doubt, if it arise from the evidence, that the defendant is guilty of the crime, should be given to him. *O'Connell v. People*, (N. Y.) 87 N. Y. 377.

The definition that a reasonable doubt "is not a mere guess or surmise that the man may not be guilty, it is such a doubt as a reasonable man might entertain after a fair review and consideration of the evidence—a doubt for which some good reason arising from the evidence can be given," was approved by the court of appeals in *People v. Guidici*, (N.Y.) 100 N.Y. 503; 3 N.Y. Cr. 559.

See *People v. Brickner*, (N.Y.) 8 N. Y. Cr. 221, 223; 15 N. Y. Supp. 530, 531.

In a murder case, an instruction that "a reasonable doubt is a strong, substantial, well-founded doubt, founded in the evidence," is not error. *State v. Senn* (S. C.), 11 S. E. 292.

A charge, on the presumption of innocence and reasonable doubt, that "the defendant is presumed by law to be innocent until his guilt is established, by legal evidence, to the satisfaction of jury, beyond a reasonable doubt," held to be full and correct. *Gallagher v. State* (Tex.), 12 S. W. 1087; 28 Tex. App. 247.

A charge that, "unless the evidence against the prisoner should be such as to exclude to a moral certainty every hypothesis but that of his guilt of the offense imputed to him, they must find the defendant not guilty," is correct. *Riley v. State*, 7 So. 104; 88 Ala. 188; *id.* 7 So. 149; 88 Ala. 193.

It is error to refuse to instruct the jury that "the law presumes the defendant to be innocent of the commission of any crime, and this presumption continues in his favor throughout the trial of the cause, step by step, and you cannot find the accused guilty of the crime covered by the indictment until the evidence in the cause satisfies you, beyond a reasonable doubt, of his guilt. And, so long as you or any one of you have a reasonable doubt as to the existence of any one of the elements necessary to constitute the several crimes above defined, the accused cannot be convicted of such crime." Following *Castle v. State*, 75 Ind. 146; *Aszman v. State*, (Ind.), 24 N. E. 123.

The following instruction was properly given: "If the jury are satisfied from the evidence beyond a reasonable doubt that defendant committed the crime charged against him, they are not legally bound to acquit him, because they may not be entirely satisfied that defendant, and no other person, committed the alleged offense." Following *State v. Nelson*, 11 Nev. 340; *State v. Jones*, 11 P. 317, *19 Nev. 365.

A charge that reasonable doubt must be a "strong" doubt is not misleading. *State v. Bodie* (S. C.), 11 S. E. 624.

An instruction that "the doubt which requires an acquittal must be actual and substantial, not mere possibility or speculation; it is not a mere possible doubt, because everything relating to human affairs, and depending upon moral evidence, is open to

some possible or imaginary doubt," is unobjectionable. *Little v. State* (Ala.), 8 So. 82; 89 Ala. 99.

Where no adequate definition of reasonable doubt is given, it is error to refuse to instruct the jury that "a reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause." *Wacaser v. People* (Ill.), 25 N. E. 564.

A charge that "by 'reasonable doubt' is meant 'actual, substantial doubt,' it is that state of the case which, after a comparison and consideration of the evidence, leaves the minds of the jurors in that condition that they cannot feel an abiding conviction of the defendant's guilt, and are fully satisfied of the truth of the charge; it is such a doubt as would cause a reasonable, prudent, and considerate man, in the graver and more important affairs of life, to pause and hesitate before acting upon the truth of the matter charged," is not prejudicial, when connected with an instruction that the jury must acquit if they entertain "any reasonable doubt upon any single fact or element necessary to constitute the crime." *State v. Gibbs* (Mont.), 25 P. 289.

On a trial for maliciously shooting and wounding, the jury were charged to convict of felony if they believed, to the exclusion of a reasonable doubt, that the accused maliciously shot and wounded the prosecuting witness, and of a misdemeanor, if they found, beyond a reasonable doubt, that the accused did shoot and wound, but in sudden heat and passion, and not in malice; and that in case they found him guilty, but had a reasonable doubt whether of felony or misdemeanor, they should convict of the latter only. In another instruction, the accused was given the benefit of the rule as to a reasonable doubt on the whole case. Held, as favorable to the accused as he had a right to demand. *Jackson v. Commonwealth* (Ky.), 14 S. W. 677.

A charge that "it is not a matter of the number of witnesses, but the preponderance; and you may, if you retain a reasonable doubt, give the defendant the benefit of it," while not specially clear and perspicuous, is not yet erroneous. *People v. Christensen* (Cal.), 24 P. 888; 85 Cal. 568.

Where, on an issue as to the insanity of defendant in a trial for homicide, the court instructed the jury that the existence of insanity must be shown by evidence to their "satisfaction," and that they must "believe" from the evidence that defendant did not know right from wrong by reason of insanity, etc., the instruction was misleading, as charging that the plea of insanity must be proven beyond a reasonable doubt, but that the error was cured by a further instruction that, if the jury had a reason-

able doubt as to any fact necessary to constitute defendant's guilt, they must acquit. *Smith v. Commonwealth* (Ky.), 17 S. W. 868.

Evidence that defendant, indicted for shooting his wife, was in trouble with his family, and was disturbed in mind and perhaps somewhat excited, is not sufficient to raise a reasonable doubt in regard to his sanity. *Montag v. People* (Ill. Sup.), 30 N. E. 337.

An instruction that proof of alibi must be clear and convincing is not erroneous, in connection with a further charge that it was not necessary that the alibi should be proved beyond a reasonable doubt, but that a preponderance of evidence was sufficient. *State v. Jackson* (S. C.), 15 S. E. 559.

Where there is evidence of defendant's good character, it is not error for the court, after fairly charging the jury on the effect of reasonable doubt and of good character, to instruct them that positive testimony of the commission of a crime extinguishes good reputation altogether, if the testimony is believed, and that good character may be sufficient to raise that reasonable doubt which requires the jury to acquit. 16 N. Y. S. 362, affirmed. *People v. Brooks* (N. Y.), 30 N. E. 189; 131 N. Y. 321.

On a trial for larceny it is error for the court to refuse to charge, at the request of defendant; that "if the jury, on considering all of the testimony, have a reasonable doubt about defendant's guilt, arising out of any part of the evidence, they should find him not guilty." *Hurd v. State* (Ala.), 10 So. 528.

In a murder trial, an instruction in regard to a reasonable doubt is not erroneous because requiring the doubt to grow out of the whole evidence. *Baker v. Commonwealth* (Ky.), 17 S. W. 625.

It is not reversible error to instruct the jury that, "if you have a reasonable doubt of the defendant's guilt, you must acquit him; but a doubt, to authorize an acquittal, must be a substantial doubt, arising from the insufficiency of the evidence, and not a mere possibility of his innocence;" where the jury are told in another instruction that "a reasonable doubt is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say that they feel an abiding conviction to a moral certainty of the truth of the charge." *State v. Talmage* (Mo. Sup.), 17 S. W. 990.

An instruction, in a criminal case, that a reasonable doubt of defendant's guilt is not the same as a probability of his innocence, but that such a doubt may exist when the evidence fails to establish a probability of innocence, is not objectionable on the ground that it is argumentative, or that the phrase "probability of inno-

cence" is of such a character as to require explanation. *Bain v. State* (Ala.), 10 So. 517.

The jury were properly instructed that to warrant a conviction "the circumstances proven must not only be consistent with his guilt, but they must be inconsistent with his innocence, and such as to exclude every reasonable hypothesis but that of his guilt." *Lancaster v. State* (Tenn.), 18 S. W. 777.

In a criminal case a charge that "a reasonable doubt is such as a reasonable man would have, after a careful investigation of any important subject, that prevents his being able to come to a satisfactory conclusion about it one way or the other," is not error. *Johnson v. State* (Ga.), 14 S. E. 889.

By a reasonable doubt is not meant certainty beyond all doubt whatsoever, but that defendant should be acquitted if there is some substantial doubt, arising from the evidence, or the want of it, which is not a mere possibility of innocence. *State v. Turner* (Mo. Sup.), 19 S. W. 645.

It is not error to instruct the jury in defining a reasonable doubt that, "if the evidence in any case is sufficient to satisfy a jury to an extent which would justify them in acting upon the more important affairs of life, then the jury are satisfied beyond a reasonable doubt." *United States v. Heath* (D. C.), 19 Wash. Law R. 818.

An instruction defining a reasonable doubt as "a substantial and well-founded doubt in the case arising out of the evidence in the case, and not a mere possibility that defendant is innocent," is proper in defining the doubt as "a substantial doubt," and not as "a real and substantial doubt." *State v. Davidson*, 44 Mo. App. 513.

Where, on a criminal trial, the charge of the court is otherwise clear and proper on the subject of a reasonable doubt, the fact that it states that the jury should not search for a doubt is not prejudicial error. *Kelly v. People* (Colo. Sup.), 29 P. 805.

Where the court charged that, if the jury had a reasonable doubt of the guilt of defendant, they should acquit, and added that if they were satisfied, beyond a reasonable doubt, as to his guilt, they should convict, the jury probably understood that they were to acquit of any grade of offense touching which they had a reasonable doubt, and convict of any grade of offense touching which they had none. *Ramsey v. State* (Ga.), 17 S. E. 613.

Where there was some evidence of suicide, and the jury was properly instructed that the guilt of accused should be shown beyond a reasonable doubt, it was not error to omit the charge that he was entitled to the benefit of any reasonable doubt raised by the evidence as to suicide. *State v. Bradley*, 24 A. 1053, 64 Vt. 466.

An instruction that, unless the jury were satisfied beyond a reasonable doubt that defendant killed deceased, they should find him not guilty, although not to be commended, in leading to the possible inference that, if thus satisfied, they were to find him guilty, does not contain a positive misstatement, and, where the killing is admitted, is not misleading. *Fields v. State* (Ind. Sup.), 32 N. E. 780.

Such an instruction, followed by the statement that, if the jury were thus satisfied, and there remained a reasonable doubt as to whether the killing was with premeditated malice, defendant could not be found guilty in the first degree, is erroneous. *Fields v. State* (Ind. Sup.), 32 N. E. 780.

In a prosecution for homicide, defendant is not required to "satisfy" the jury that his act was justifiable, it being sufficient if the evidence for the defense raises in their minds a reasonable doubt of his guilt, and an instruction to the contrary is reversible error. *Trogdon v. State* (Ind. Sup.), 32 N. E. 725.

It is not error to instruct that, "if the evidence in any case is sufficient to satisfy a jury to an extent which would justify them in acting upon the more important affairs of life, then the jury are satisfied beyond a reasonable doubt. *United States v. Heath*, 20 D. C. 272.

A reasonable doubt of the guilt of one charged with conspiring against the United States is a doubt based on reason, and which is reasonable in view of all the evidence — an honest, substantial misgiving generated by insufficiency of proof — and not a captious doubt, or a doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony; nor is it a doubt born of a merciful inclination to permit defendant to escape conviction, or prompted by sympathy for him or those connected with him. *United States v. Newton* (D. C.), 52 F. 275.

An instruction that a reasonable doubt must be a substantial doubt, based upon the evidence or lack of evidence on the whole case, and not a mere possibility of innocence, is unobjectionable, aside from its verbosity. *State v. Wells*, 20 S. W. 232, 111 Mo. 533.

The court, after giving an instruction requested by defendant as to circumstantial evidence, told the jury that the existence of any fact may be established by such evidence, if proven beyond a reasonable doubt; that absolute certainty was not required; and that a reasonable doubt is a doubt having a foundation in reason. Held, that such instruction was not erroneous, on the ground that it did not sufficiently define a reasonable doubt, since, if defendant desired a more explicit definition, he should have requested it. *Conrad v. State* (Ind. Sup.), 31 N. E. 805; 132 Ind. 254.

An instruction in a criminal case that "the presumption of law is that defendants are innocent, and this presumption continues with them until it is overcome by evidence, beyond a reasonable doubt, that they are guilty as charged; a reasonable doubt is not a mere possibility of a doubt, but it must be a reasonable doubt, growing out of all the evidence and circumstances in evidence in the case," is a sufficient charge as to reasonable doubt. *Territory v. Chavez* (N. M.), 30 P. 903.

An instruction is not erroneous, as giving the jury an idea that a reasonable doubt is but a small thing, which states that it "does not mean anything more than" that the jury should be satisfied beyond a doubt which, as reasonable men, they would entertain in matters of moment to themselves; that the doubt should arise on examination of the case, from either the evidence, statement of defendant, conflict in the evidence, or lack of evidence; and that it does not mean the doubt of an eccentric mind, crank, or men with an oversensitive conscience. *Lewis v. State* (Ga.), 15 S. E. 697.

An instruction that a reasonable doubt is such as arises in the minds of conscientious men "from the consideration of the testimony" or from the absence of evidence, and not a mere fanciful doubt conjured up from "an overweening desire to acquit," is substantially correct. *Hodgkins v. State*, 15 S. E. 695, 89 Ga. 761.

On the question of doubt, it is not error to charge that reasonable doubt cannot be said to exist where the jury are so firmly convinced of the facts necessary to establish defendant's guilt that, if it was a very grave and serious matter, affecting their own affairs, they would not hesitate to act on such conviction. *People v. Wayman* (N. Y.), 27 N. E. 1070; 128 N. Y. 585, and *Miles v. U. S.* 103 U. S. 309, followed. *People v. Hughes* (N. Y.), 32 N. E. 1105 137 N. Y. 29.

An instruction that a mere possibility that defendant is not guilty does not amount to a reasonable doubt; that the doubt must be a reasonable one, and "not a simple doubt," is not erroneous. *People v. Kerm* (Utah), 30 P. 988.

An instruction is unobjectionable, which charges the jury that a "reasonable doubt" must arise from the evidence, that it must be "sustained," and not "a whim" or "groundless surmise," and that there should be an acquittal if there is a doubt of guilt in the inward conscience, but that "there is no such thing as absolute certainty." *Welsh v. State* (Ala.), 11 So. 450.

It is error to refuse to charge that a "reasonable doubt" is a doubt for which a reason can be given. *Cohen v. State*, 50 Ala. 108, approved. *Hodge v. State* (Ala.), 12 So. 164.

It is not error to omit from a request to charge on the law of reasonable doubt the phrase that "to doubt is to acquit," where the remainder of the instruction is in the most favorable form for defendant. *Taylor v. Commonwealth (Va.)*, 17 S. E. 812.

The court erred in refusing to charge that defendant was presumed to be innocent until his guilt was shown by competent evidence, beyond a reasonable doubt, and that, if the jury had a reasonable doubt as to defendant's guilt, they should acquit. *Pierce v. State (Tex. Cr. App.)*, 22 S. W. 587.

It is proper to instruct the jury that it is not necessary to prove every fact and each link in the chain of circumstances relied on beyond a reasonable doubt, if the jury, taking all the evidence together, are satisfied beyond a reasonable doubt that the defendant is guilty. *Weaver v. People*, 24 N. E. 571; 132 Ill. 536, followed. *Siebert v. People (Ill. Sup.)*, 32 N. E. 431.

There was no error in refusing defendant's request that the burden of proof was on the prosecution, and if, from the whole evidence, the jury entertain a reasonable doubt of defendant's guilt, he is entitled to the benefit thereof, where the recorder, in his general charge, said that defendant was entitled to "the benefit of every reasonable doubt arising out of the evidence," and that he is presumed to be innocent "until that presumption is overcome by proof satisfactory to" the jury. *People v. Pallister (N. Y.)*, 33 N. E. 741; 138 N. Y. 601.

Where, on a trial for the theft of a horse, defendant claimed to have purchased the same, the court properly instructed the jury to acquit defendant if the evidence raised a reasonable doubt "as to his having bought the horse." *Gentry v. State (Tex. Cr. App.)*, 20 S. W. 551.

In a criminal case, where the court has charged the jury to acquit if there is a probability of defendant's innocence, it is proper for the court to define "probable" as "more evidence for than against, supported by evidence which inclines the mind to belief, but leaves some room for doubt." *Williams v. State (Ala.)*, 12 So. 808.

A charge on reasonable doubt, followed by the phrase, "I charge you, however, that in legal investigations mathematical certainty is not attainable," is not vitiated by the use of the word "however." *McTyler v. State*, 18 S. E. 140; 91 Ga. 254.

An instruction that a doubt is not sufficient to justify acquittal unless it be such as would cause a reasonable and prudent man to hesitate and pause in the graver transactions of life, is correct. *Boulden v. State (Ala.)*, 15 So. 341.

An instruction defining "reasonable doubt" as such a doubt as would make a man of ordinary prudence waiver or hesitate in

arriving at a conclusion, in considering a matter of like importance to himself as the case on trial is to defendant, is not objectionable as requiring less positive proof of facts in cases of minor importance than in those of a graver nature. *State v. Rosener*, 35 P. 357; 8 Wash. 42.

An instruction which defines a "reasonable doubt" as "such a doubt as a juror can give a reason for," though open to criticism, is not reversible error, where it means, when read with the whole instruction given, that indefinable doubt, which cannot be stated with the reason on which it rests, cannot be considered a reasonable doubt. *State v. Morey* (Or.), 36 P. 573.

It is error to refuse to charge the jury that, "if there is a probability of the defendant's innocence, they must acquit." *Prince v. State* (Ala.), 14 So. 409.

Where the court charged that defendant was presumed to be innocent until his guilt was established beyond a reasonable doubt, and, if there is a reasonable doubt of his guilt, he should be acquitted, a charge that, "if you believe the defendant innocent, you will acquit him," is not misleading. *Nowlan v. State* (Tex. Cr. App.), 25 S. W. 774.

On a trial for assault with intent to murder, where the court, in his charge, applies the question of reasonable doubt to the whole case, he need not also expressly apply it to an alleged conspiracy to commit the crime charged. *Stewart v. State* (Tex. Cr. App.), 26 S. W. 203.

It is proper to instruct the jury that "the reasonable doubt the jury are permitted to entertain must be as to the guilt of the accused on the whole of the evidence, and not as to any particular fact in the case," and to refuse to instruct them to acquit if they entertain any reasonable doubt as to defendant's presence at the scene of the crime when it occurred. *Carlton v. People* (Ill. Sup.), 37 N. E. 244.

An instruction that a reasonable doubt is such a doubt as naturally arises after considering all the evidence introduced, when reviewed in the light of all the facts and circumstances surrounding the same, was not erroneous, in that it permitted the jury to consider all the facts, whether in evidence or not. *State v. Case* (Iowa), 65 N. W. 149.

RULE HELD NOT APPLICABLE.—Failure to charge on reasonable doubt is error. *State v. Gullette* (Mo. Sup.), 26 S. W. 354. There was no error in refusing an instruction that the jury must return a verdict of not guilty unless convinced to an "absolute moral certainty" of defendant's guilt. *People v. Hecker* (Cal.), 42 P. 307.

Error cannot be predicated of the court's refusal to explain the term "reasonable doubt," it being difficult to explain the term so as to make it plainer. *State v. Robinson* (Mo. Sup.), 23 S. W. 1066; 117 Mo. 649.

An instruction that a reasonable doubt is a substantial doubt of defendant's guilt, founded and based upon the evidence and all the facts and circumstances proven in the case, and not a mere possibility of innocence; that, if the jury were not morally certain as to defendant's guilt or innocence, then a reasonable doubt exists,—was proper. *State v. David* (Mo. Sup.), 33 S. W. 28.

Where an indictment contains all necessary allegations, it is not error to charge that the state must prove beyond a reasonable doubt the material allegations of the indictment. *Walker v. State* (Ind. Sup.), 36 N. E. 356.

A charge that, in order to convict, the evidence should be so convincing as to lead the mind to the conclusion that the accused "cannot be guiltless," is properly refused. *Webb v. State* (Ala.), 18 So. 491.

An instruction which limits reasonable doubt to one element of the proof, instead of requiring it to arise out of all the evidence, is erroneous. *Lyons v. People* (Ill.), 27 N. E. 677.

It is incorrect to charge that all of the various facts and circumstances relied on to prove a fact must be proved beyond a reasonable doubt. *State v. Crane* (N. C.), 15 S. E. 231; 110 N. C. 530.

It is erroneous to instruct the jury that "a reasonable doubt is such a doubt as the jury are able to give a reason for." *Silberry v. State* (Ind. Sup.), 33 N. E. 681.

It is not error for the judge to refuse to define "reasonable doubt" in the words asked by defendant, no set formula being required. *State v. Whitson*, 16 S. E. 332; 11 N. C. 695.

Defendant is not entitled to single out each material fact in a criminal action for an instruction as to acquittal, in case merely of a reasonable doubt as to the evidence in regard to such fact, but the doubt must be upon the whole case. *State v. Wells* (Mo. Sup.), 20 S. W. 232; 111 Mo. 533.

The addition to an instruction that, "to warrant a conviction, defendant must be proven guilty so clearly and conclusively that there is no reasonable theory on which he can be innocent, when all the evidence is considered together," of the remark, "and if there is any one material fact, which is proved to the satisfaction of the jury, by a preponderance of the evidence, which is inconsistent with the guilt of the defendant, this is sufficient to raise a reasonable doubt," is misleading. *State v. Judiesch* (Iowa), 65 N. W. 157.

A charge implying that, if evidence of defendant's good character generates a reasonable doubt of his guilt, the jury may acquit, notwithstanding the other evidence shows him guilty beyond a reasonable doubt, is properly refused. *Webb v. State* (Ala.), 18 So. 491.

Where the court has already instructed that the law presumes a person innocent until his guilt is proven by legal evidence, beyond a reasonable doubt, to the satisfaction of the jury, and, if the jury have such a doubt of the guilt of appellant, they should acquit him, it is not error to refuse further instructions as to the presumption of innocence and reasonable doubt. *Countee v. State* (Tex. Cr. App.), 33 S. W. 127.

It is proper to refuse to instruct a jury that, if any one of them entertained a reasonable doubt of the guilt of the accused, it would be the duty of the jury to acquit. *Boyd v. State*, 14 So. 836; 33 Fla. 316.

An instruction to the effect that, though the facts proved are consistent with defendant's innocence, the jury are not bound to acquit unless they have a reasonable doubt of his guilt, is erroneous. *Holder v. State* (Ark.), 25 S. W. 279; 58 Ark. 473.

A charge that if the jury believe the evidence they must find defendant guilty as charged is erroneous as failing to require belief beyond a reasonable doubt. *Harris v. State* (Ala.), 14 So. 538.

The court, having repeatedly charged that no mere weight of evidence is enough to convict unless it excludes all reasonable doubt, and is inconsistent with any other rational supposition, properly refused to charge that no jury should convict on mere suspicion, or that they must be convinced beyond a reasonable doubt. *Murphy v. State*, 57 N. W. 361; 86 Wis. 626.

A request to charge that, if there was any one single fact proved to the satisfaction of the jury, by a preponderance of the evidence, inconsistent with defendant's guilt, it was sufficient to raise a reasonable doubt, is too broad, and properly refused. *Davidson v. State* (Ind. Sup.), 34 N. E. 972.

A charge that, if the jury believe the evidence, they must find defendant guilty, is error, as not requiring them to believe it beyond a reasonable doubt. *Heath v. State* (Ala.), 13 So. 689.

In a trial for murder, an instruction to find the defendant guilty if the jury "believe from the evidence," etc., is erroneous, in omitting the clause "beyond a reasonable doubt." *Pierson v. State* (Ala.), 13 So. 550.

On a trial for murder, the refusal to give an instruction that the jury must acquit if they have a reasonable doubt of defendant's guilt is reversible error. *Forney v. State*, 13 So. 540; 98 Ala. 19.

On a trial for murder defendant requested a charge that, "while it is true that defendant is required to prove that he was of unsound mind at the time of the homicide by a preponderance of evidence, it is also true that upon the consideration of the testimony of the whole case, if any reasonable doubt remains in the minds of the jury, defendant is entitled to a verdict of not guilty." The court did not refuse to so charge, but omitted to do so. Held, that the omission was error. *McIVER, C. J.*, dissenting on the ground that the requested instruction was covered by the general charge. *State v. McIntosh* (S. C.), 17 S. E. 446.

On an indictment for murder, an instruction that, if any reasonable doubt exist in the minds of the jury as to the credibility of any witness, they must give the benefit of the doubt to the prisoner, is properly refused, it being unintelligible and misleading. *Shipp v. Commonwealth* (Va.), 10 S. E. 1065.

It is not error for a court to refuse to charge, on a trial for murder, that the defendant is entitled to "a reasonable doubt upon every and any question of fact in the cause." *State v. Acker* (N. J.), 19 A. 258.

On indictment for murder, an instruction which requires "clear and distinct proof" is erroneous in requiring a higher degree of proof than is necessary to convince beyond a reasonable doubt. *Griffith v. State* (Ala.), 8 So. 812; 90 Ala. 583.

On indictment for murder, an instruction which requires the jury to be "indubitably certain" of defendant's guilt, or to be able to say "where the truth indubitably lies," is properly refused, as requiring more proof than is necessary to overcome a reasonable doubt. *Ross v. State* (Ala.), 9 So. 357.

An instruction to acquit of murder unless the jury have an abiding and "absolute" belief of defendant's guilt requires too great a measure of proof. *Whatley v. State* (Ala.), 9 So. 236.

On a murder trial it was not error for the court to refuse to charge "that, if the jury believe from the evidence that defendant is a man of good moral character, then that itself may generate a doubt, although none otherwise exists," as such charge would tend to mislead. *Johnston v. State* (Ala.), 10 So. 667.

Where, on a trial for murder, the defense is insanity, it is error to charge that "to establish a defense on the ground of insanity, it must be clearly proved that, at the time of committing the act, the party accused was laboring under such a defect of reason from disease of the mind as not to know the nature of the act he was doing," as the law only requires a preponderance of the evidence; and, where there is a reasonable doubt as to the sanity of the defendant, he is entitled to that doubt. *Commonwealth v. Gerade*, 22 A. 464; 145 Pa. St. 289; 28 W. N. C. 261.

On a murder trial, the court is not bound to instruct the jury that, when the proof in favor of defendant is stronger and more direct than the evidence against him, there is room for doubt, and he ought not to be convicted. *Pool v. State* (Ga.), 13 S. E. 556.

On a murder trial, a request to charge with reference to doubt, with no qualification as to the doubt being reasonable, was properly refused. *Pool v. State* (Ga.), 13 S. E. 556; 87 Ga. 526.

In a criminal case, an instruction that, "if the jury believe all the evidence, they cannot acquit defendant," is reversible error, as it does not require them to believe the evidence beyond a reasonable doubt. *Hooks v. State* (Ala.), 13 So. 767.

Instructing the jury to find defendant guilty of murder if they "believe" that he formed a design to, and did, kill deceased, is erroneous, though, in another portion of the charge, the jury is properly instructed as to reasonable doubt. *Rhea v. State* (Ala.), 14 So. 853.

It is proper to refuse to charge that, "if there is a probable doubt of the guilt of the defendant, the jury must acquit." *Prince v. State* (Ala.), 14 So. 409.

It is proper to refuse a charge that jurors should doubt or be convinced as men. *People v. Johnson* (N. Y.), 35 N. E. 604; 140 N. Y. 350.

It is error to instruct that "if you have not an abiding conviction, to a moral certainty, of the truth of the charge against defendant, you have such a reasonable doubt that will warrant you in returning a verdict of not guilty; otherwise you have not a reasonable doubt that will warrant an acquittal,"—as such instruction is confusing and misleading. *United States v. Romero* (Ariz.), 35 P. 1059.

A request to charge that, "if there is, from the evidence, a reasonable possibility of defendant's innocence, the jury should acquit," is properly refused, since there may be evidence to suggest a "possibility" of innocence, and yet, from the whole evidence, no reasonable doubt of defendant's guilt. *Sims v. State* (Ala.), 14 So. 560.

It is proper to refuse to instruct the jury that "the degree of evidence required to convict a defendant in a criminal case must be such as to remove all doubt from the mind of a reasonable man," since a reasonable man may have an unreasonable doubt. *Padfield v. People*, 35 N. E. 469; 146 Ill. 660.

An instruction that proof of contradiction on the part of a witness may be sufficient to raise reasonable doubt of the truth of her testimony, and if the jury have such reasonable doubt, they should reject her testimony, and not consider it, is properly denied. *Green v. State* (Ala.), 12 So. 416.

Where the evidence in a criminal case is wholly circumstantial, it is error to instruct the jury that they need not be satisfied beyond a reasonable doubt of each link in the chain of circumstances relied upon to establish the defendant's guilt. *Graves v. People* (Colo. Sup.), 32 P. 63.

It is proper to refuse to instruct the jury to acquit if they entertain a reasonable doubt as to defendant's sanity, since reasonable doubt, in order to acquit, must be a doubt as to defendant's guilt, and not as to any particular fact in the case. *Hornish v. People* (Ill. Sup.), 32 N. E. 677.

An instruction that, "where the law says you must be satisfied beyond a reasonable doubt before you can convict, it means that your mind must be so thoroughly convinced that you would act upon the conviction in matters of the highest concern and importance to yourself," does not define "reasonable doubt," and is erroneous. *Lovett v. State*, 11 So. 550; 30 Fla. 142.

In a criminal prosecution an instruction that "the term 'reasonable doubt,' as used in these instructions, means a doubt which has some good reason for it arising out of the evidence in the case; such a doubt as you are able to find a reason in the evidence for,"—is erroneous, and cause for reversal of a conviction. *Childs v. State* (Neb.), 51 N. W. 837.

In a criminal case the court properly refused to charge, in connection with reasonable doubt, that, where it is possible from the evidence to account for the commission of the crime by some person other than defendant, defendant must, in that event, be found not guilty. *Magee v. People* (Ill. Sup.), 28 N. E. 1077.

A charge that if the evidence of defendant's good character generates a doubt in the jury's mind, apart from all the other evidence in defendant's favor, they must acquit, is properly refused. *Pate v. State* (Ala.), 10 So. 665.

It is error to instruct the jury that "if they shall believe from the evidence, beyond a reasonable doubt, that the killing has been proven as charged, then any defense which defendant may rely upon in justification or excuse of the act, or to reduce the killing to the grade of manslaughter, it is incumbent on the defendant to satisfactorily establish, unless the proof thereof arises out of the evidence produced against him," since such instruction deprives defendant of the benefit of any reasonable doubt as to the grade of the offense. *Alexander v. People*, 96 Ill. 96, followed. *Smith v. People* (Ill. Sup.), 31 N. E. 599.

It is not error for the court to refuse to charge that, in order to find defendant guilty, the jury must be convinced beyond a reasonable doubt, both that defendant took the life of deceased, and

that he did it with premeditation and deliberation. *Hornsby v. State* (Ala.), 10 So. 522.

A statement in an instruction that if, on full consideration of all the evidence, you are "fairly and clearly satisfied" of defendant's guilt, is equivalent to saying that the jury must be "entirely satisfied." *People v. Ribolsi* (Cal.), 26 P. 1082.

A requested charge that defendant be acquitted "if there is any doubt of the defendant's guilt, which is not purely speculative doubt," is erroneous, as requiring a higher degree of proof than the law requires. *Perry v. State* (Ala.), 9 So. 279.

On the subject of reasonable doubt, a charge that, if the jury thought that defendant did not commit the crime alleged, they should give him the benefit of the doubt, is insufficient and erroneous. *State v. Raymond* (N. J.), 21 A. 328.

An instruction that, if the jury believe, "beyond a reasonable doubt," that defendant took the hogs under an honest claim of right, they should acquit him, is erroneous, as it is not necessary to prove defendant's innocent intent, "beyond a reasonable doubt." *Lewis v. State* (Tex.), 14 S. W. 1008.

An instruction that, if the jury believe defendant is guilty beyond a reasonable doubt, they must not acquit because there may be a mere probability of his innocence, is erroneous in using the term "probability" instead of "possibility." *Smith v. State* (Ala.), 9 So. 408.

An instruction to a jury that a reasonable doubt "is a doubt that you, as jurors, can give a reason for," is inaccurate and misleading, though perphased by the statement that "by a reasonable doubt is meant not a captious or whimsical doubt." *MINSHALL, J.*, dissenting. *Morgan v. State* (Ohio), 27 N. E. 710.

An instruction that a reasonable doubt must be a "substantial, well-founded doubt," while not approved, does not require a reversal. *State v. Young* (Mo.), 16 S. W. 408.

In *Rhodes v. State* (Ind.), 27 N. E. 866, as to reasonable doubt, the court gave only the following charges: "The defendant is presumed to be innocent, and before he can be convicted the state must prove him guilty beyond a reasonable doubt." "A reasonable doubt arises when the evidence is not sufficient to satisfy the minds of the jury to a moral or reasonable certainty of defendant's guilt. A reasonable doubt is not an unreasonable doubt; it is a doubt for which a reason can be given. It is not a mere surmise or guess that the defendant may not be guilty of what he is charged with." "The defendant is to have the benefit of any doubt. If, however, all the facts established necessarily lead the mind to the conclusion that he is guilty, though there is a bare possibility that he may be innocent, you should find him guilty." It

was held, that such instructions did not fully define a "reasonable doubt," and that the last sentence was not the law, because it failed to state that the evidence must exclude every "reasonable doubt."

To a charge that guilt must be proved beyond a reasonable doubt, it is error to add that "in determining this question of doubt you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs. *Territory v. Bannigan* (Dak.), 46 N. W. 597.

A charge that defendant is entitled to acquittal if there is a reasonable doubt, but that "mere possible doubts, however reasonable, which beset some minds on all occasions," should not prevent conviction, is meaningless and confusing; but where the whole charge contained a sufficiently clear definition of reasonable doubt, the judgment will not be reversed. *People v. Chun Heong* (Cal.), 24 P. 1021; 86 Cal. 329.

It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importances to himself." *People v. Bemmerly* (Cal.), 25 P. 266; 87 Cal. 117.

It is error to charge that a reasonable doubt is "such a doubt as would induce a man of reasonable firmness and judgment to act upon it in matters of importance to himself." Following *People v. Bemmerly*, 25 P. 266. *People v. Wohlfrom* (Cal.), 26 P. 236.

A doubt that would cause one to pause and hesitate is, if fairly derived from the evidence, a reasonable one, within the meaning of the criminal law, and an instruction to the jury "it is such a doubt as would influence or control you in your actions in any of the important transaction of life" is erroneous. *Commonwealth v. Miller* (Pa.), 21 A. 138; 27 W. N. C. 257.

A charge that, if the jury believe that defendant did not commit the theft as charged, they must find him not guilty, is error, since it bases his right to acquittal on the jury's belief in his innocence, instead of his guilt. *Moore v. State* (Tex.), 13 S. W. 152; 28 Tex. App. 377.

The instruction to a jury by a lower court, in applying the rule as to reasonable doubt, to acquit the defendant "if all the facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty," is contrary to the meaning of the term "reasonable doubt," as approved in *State v. Nueslein*, 25 Mo. 111, and repeatedly sanctioned by the supreme court, and is erroneous. *State v. Shaeffer* (Mo.), 1 S. W. 293; 89 Mo. 271.

An instruction that "the proof is deemed sufficient when the evidence is sufficient to impress the judgment of ordinarily prudent men with a conviction on which they would act in an important affair of their own" does not correctly state the law of reasonable doubt. *Palmerston v. Territory (Wyo.)*, 23 P. 73.

Where the jury are charged that the state must prove every point beyond a reasonable doubt, and that if they have any reasonable doubt they must give defendant the benefit of the doubt, and that defendant must prove his plea of self defense by a preponderance of the evidence, it is not necessary to charge them that, if they have a reasonable doubt as to which way is the preponderance of evidence as to the plea of self defense, they must give defendant the benefit thereof. *State v. Bodie (S. C.)*, 11 S. E. 624.

Supreme Court of Iowa.

(Filed December 12, 1895).

STATE v. CAYWOOD.

1. PERJURY—OATH.

Where the indictment charges that the defendant was sworn by "the court," it is sustained by the evidence that the oath was administered either by the judge or the clerk.

2. FORMER ADJUDICATION—ACQUITTAL.

A judgment of acquittal, rendered in the case in which the alleged perjury was committed, is not admissible on a trial for perjury to show the guilt or innocence of the defendant.

3. TRIAL—MATERIALITY OF TESTIMONY.

The question of determining the materiality of the evidence offered in a case is always one for the court, and the same rule should apply when it becomes necessary to determine whether evidence offered upon the trial of another case was material.

Appeal from a judgment convicting defendant of the crime of perjury.

F. P. Greenlee, J. M. Junkin, and Smith McPherson, for appellant.

Milton Remeley, Atty. Gen., and Edward Mills, Co. Atty., for the State.

KINNE, J.—1. The indictment charges that, in the cause in which it is alleged the perjury was committed, this defendant “was then and there by the court duly sworn, at and during said trial, and the said court had full power and authority to then and there administer the oath to the said John Caywood; and the said John Caywood did then and there take his proper oath as a witness in said case, and the said court did then and there administer the said oath, as aforesaid, to the said John Caywood.” It is insisted that a “court” has no authority to administer an oath; that the indictment must set out the name of the person administering the oath; that the court is made up of the judge, the clerk, the sheriff, and members of the bar. It appears from the record that some of the evidence tends to show that the oath was administered by the trial judge, and there is other evidence which tends to show that it was administered by the clerk of the court. The question as to the want of authority in the court to administer the oath, and that defendant was not duly sworn by the court, was raised by objection to the admission of evidence, which were overruled; also in an exception taken to the following instruction given by the court: “It is alleged that the oath was administered by the court. Now, if it be shown that an oath was administered by the judge presiding at the trial, or by the clerk of the court and in either event in open court, this will be sufficient upon this point.” The Code of 1851 (section 1594) provided: “All courts have power to administer oaths connected with any matter pending before them, either by any judge, justice or clerk thereto, or by any other person appointed for that purpose by them.” The same provision is found in Revision 1860, § 2684. The Code of 1851 also contained independent provisions authorizing oaths to be administered by each judge of the supreme court, each judge of the district court, each clerk of the supreme court, each clerk of the district court, each justice of the peace, each notary public, each judge of the county court, and by the prosecuting attorney when acting in his stead. Code 1851, § 979. Now, the Revision of 1860 contained in section 2684 the same provisions as are found

in section 1594 of the Code of 1851. It also contained independent provisions, authorizing the same officers to administer oaths as are authorized by Code 1851, § 979. See Revision 1860, §§ 201, 1843. In the Code of 1873, section 2684 of the Revision is omitted, and by section 277 the following, among other officers, are authorized to administer oaths, viz.: Each judge of the supreme court, each judge of the district court, the clerk of the supreme court, each clerk of the district court, as such. From the fact that section 2684 of the Revision is omitted from the Code of 1873, and because the "court" is not in express terms mentioned in section 277 as being authorized to administer an oath, it is contended that no such authority is now vested in the court. This claim is grounded on the theory that there is a distinction between a court and a judge, and that many powers conferred upon a judge cannot be exercised when the same judge is sitting as a court. *Cummings v. Railroad Co.*, 36 Iowa, 173. Nevertheless, it is true that the term "court" may sometimes be construed to mean the judge of the court, depending upon the connection and object of its use. So, a court is defined as "the judge, or body of judges presiding over a court." Black, Law Dict. tit. "Court." Our statute providing what shall be essential in an indictment for perjury requires the indictment to state "in what court or before whom the oath alleged to be false was taken." Code 1873, § 4312. In *State v. O'Hagan*, 38 Iowa, 604, it was held that an indictment which charged that the defendant was "duly sworn before said court, the said court then having full and competent authority to administer an oath to him in that behalf," was good, and that it would have been sufficient to have charged that the defendant was "duly sworn." It is said that this case (which was decided in 1874) must have arisen prior to the time the Code of 1873 went into effect, and when the "court" was expressly authorized to administer the oath. There is, however, nothing in the opinion to indicate that the case may not have arisen after the Code of 1873 took effect. The opinion refers to certain sections in the Revision of 1860 and in the Code of 1873. Now, we think that a judge of the district court, when acting in the capacity of a court, has the same power to administer an oath as he has when not so acting. It is in many districts, and always has been, the practice for the court to administer the oath to all wit-

nesses. Can it be possible that he has no power so to do? We may readily agree that custom, in that respect, does not make the law if no power in fact exists. We think it would be an astounding doctrine to hold that, under the statute, courts have no authority to administer oaths. Furthermore, it would be, we think, giving a very narrow and unwarranted construction to the statute, when we consider the purposes sought to be attained by the authority conferred. It is true that the indictment must in some manner aver that the defendant was duly sworn by a person then having authority to administer an oath. *State v. Phippen*, 62 Iowa, 54; 17 N. W. 146. Now, the evidence shows that the oath in controversy was administered either by the court,—that is, the judge sitting as a court,—or by the clerk of the district court during the session of court, and hence in the presence of the court. If it be true that the oath was in fact administered by the clerk, it was so done under the direction of the court, and, in legal contemplation, may be said to have been administered by the “court.” A statute requiring an oath to be administered “by the court or judge” was held complied with by the oath being administered by the clerk in open court, under the direction of the court. *Oaks v. Rodgers*, 48 Cal. 197. And see *State v. Knight*, 84 N. C. 793; *Stephens v. State*, 1 Swan, 157; *Keator v. People*, 32 Mich. 484; *Walker v. State* (Ala.) 18 South. 393. Nor do we think that section 277 of the Code is a limitation on the power of the court. The power of a court to administer an oath in proper cases, in proceedings before it, inheres in the court itself, and could not be taken away except by express legislation to that effect. It has been held that it is enough to allege in an indictment for perjury that the witness was sworn before a court, and proof of swearing before an officer of court, in the presence of the court, will sustain an allegation of swearing before or by the court. 2 Whart. Cr. Law (9th Ed.) § 1287. The same eminent writer observes that swearing before a clerk in open court is equivalent to swearing before the court. *Id.* § 1315, and cases cited. So, it is held that an oath administered by a clerk of the court is the same, ordinarily, as if administered by the judge, unless the statute otherwise provides. 2 Bish. Cr. Law (5th Ed.) § 1020. Again, there could be no prejudice to the defendant if the oath was administered by

the clerk, and the indictment charged it as being administered by the court. Under our statute, the indictment is sufficient if it can be understood therefrom that the act or omission charged as the offense is stated with such a degree of certainty in ordinary and concise language, and in such a manner, as to enable a person of common understand to know what is intended, and the court to pronounce judgment upon a conviction according to the law of the case. Code, § 4305. We hold, therefore, that the judge sitting as a court has power to administer the oath to witnesses; that an indictment charging that the oath was administered by the court is sustained by evidence that the oath was administered either by the presiding judge, sitting as a court, or by the clerk under his direction, as in either event, in legal contemplation, it was administered by the court. There was therefore no error in the rulings complained of, and the instruction objected to was proper.

2. In this case the defendant filed—First, his plea of not guilty; second, his plea of former acquittal; and third, a specific plea setting out in detail what he claimed was in issue in the former trial, wherein the alleged false testimony was given, and averring that the same thing in substance was in issue in this case, of which matters he had been acquitted in the former trial. The state moved to strike this last plea, because the matter contained in it was irrelevant, redundant, and not authorized by the statute, which motion was sustained, and an exception taken to the ruling. Counsel say: "This third plea of ours, which was stricken from the files, was not so much a plea of former acquittal as it was of *res adjudicata*." Under our statute, there are but three pleas to an indictment: (1) A plea of guilty; (2) not guilty; and (3) a plea of former conviction or acquittal of the offense charged. Code, § 4359. There was then, no warrant for any other plea, and it was properly stricken out. Counsel rely upon *Clem v. State*, 42 Ind. 420, *U. S. v. Butler*, 38 Fed. 498, and *Coffey v. U. S.*, 116 U. S. 437, 6 Sup. Ct. 437. A careful examination of these cases except *Butler's*, shows that they are not applicable to the case at bar. The Indiana case will illustrate the difference. In that case one act caused the death of two persons. Two indictments were found for the murder of two

different persons. The perpetrator was placed upon trial on one of these indictments, which charged her with the crime of murder in the first degree. She was acquitted. The court held that, as the one act had been adjudged not to be murder in the first degree, she could not be again put upon trial for the death of the other person caused by the same act. In the case at bar the larceny was one act. Afterwards the defendant, upon a trial, was acquitted of that act; but in the course of the trial, it is alleged, the perjury was committed with which the defendant is now charged. The larceny and the perjury were not the same act, but two distinct offenses, committed at different times, and the cited cases do not apply. Language is used in *Butler's Case* which supports the defendant's contention. It has, however, little support in the authorities. It has often been held that a judgment of acquittal, rendered in the case in which the alleged perjury was committed, was not admissible on a trial for perjury to show the guilt or innocence of the defendant. *Hutcherson v. State* (Tex. Cr. App.), 24 S. W. 908; *Kitchen v. State* (Tex. App.) 9 id. 461, and cases cited. The court did not err in striking out the defendant's plea of *res adjudicata*.

3. The court, in the tenth paragraph of its charge, said: "And if it appears that the defendant upon that trial testified to any of the matters alleged in the indictment in this case with reference to where he was and what he did at the time it is claimed he made the admission and statements to Westlake, such testimony would be material on that former trial." It is said that the jury were the only judges as to the materiality of the testimony upon which the claim of perjury is predicated, and that the court invaded their province in thus determining for them the materiality of the testimony given by defendant in the larceny case. Counsel cite us to no authorities supporting this contention, and we think there are none. However that may be, the question of determining the materiality of the evidence offered in a case is always one for the court, and we can conceive of no reason why the same rule should not be applied when it becomes necessary to determine whether evidence offered upon the trial of another case was material. The following authorities abundantly sustain

the correctness of the instruction: 2 Whart. Cr. Law (8th ed.), § 1284; *Cothran v. State*, 39 Miss. 541; *People v. Lem You* (Cal.), 32 Pac. 12; *Power v. Price*, 16 Wend. 450; *State v. Lewis*, 10 Kan. 157; *People v. Clementshaw*, 59 Cal. 385; *Rahm v. State*, 17 S. W. 417; 30 Tex. App. 310; 2 Bish. Cr. Proc. § 935; *Gordon v. State*, 7 Atl. 476; 48 N. J. Law, 611; *Smith v. Smith* (Tex. App.), 10 S. W. 651, and cases cited; *Stanley v. U. S.* (Okl.), 33 Pac. 1025.

4. It is claimed that there was such misconduct shown on the part of two of the jurors as to require that a new trial should be granted. We need not set out in detail the facts relied upon; it is enough to say they furnish no ground for disturbing the verdict. Upon this whole record, we discover no error, and the judgment below is affirmed.

DEEMER, J., takes no part.

Supreme Court of Iowa.

(Filed December 12, 1895.)

STATE v. WEEMS.

1. CRIMINAL LAW—CHANGE OF VENUE.

An application for change of venue because of prejudice and threats of mob violence was held, in this case, properly denied.

2. SAME—CONTINUANCE.

A conviction will not be disturbed because of a refusal for a continuance at the first term, while it is not shown that defendant was prejudiced.

3. JUROR—DISQUALIFICATION.

Whether the fact that a juror has formed an opinion on one or more facts of the case is a sufficient ground for challenge, is a question of fact for the court, and depends upon whether it would prevent the juror from rendering a true verdict upon the evidence. So held where a juror in a murder trial, who had formed an opinion that deceased was murdered, stated that he could render a verdict according to the evidence.

4. CRIMINAL LAW—PRESENCE OF ONE JOINTLY INDICTED.

The question whether, on a trial for murder, the defendant's counsel should be allowed to have a person jointly indicted with defendant, and who was confined in the county jail, continually in court, ready for consultation, rests in the discretion of the trial court.

5. SAME.

The supreme court will not, where all the reasons for excluding a person jointly indicted from the court room are not in the record, presume that those not appearing were insufficient to warrant his seclusion.

6. CRIMINAL LAW—EVIDENCE.

Where, on a murder trial, a witness for the state testifies only that defendant was at a certain house on the night of the homicide, the defendant is not prejudiced by the exclusion of questions on cross-examinations as to whether the house was not a sporting house, and the witness a prostitute, where it was not disputed that defendant was at the house at the time testified to, or that he was present when deceased was killed.

7. SAME—EVIDENCE.

The mere fact that there was an attempt to identify a revolver as the pistol used and the attempt failed, does not render the evidence of the attempt immaterial so as to make the admission of it error.

8. SAME.

Where the second question, by the use of the word "and," couples it to the first question, so that the answer of the one is an answer to both, when the former has been excluded, the latter question should be excluded as incompetent.

9. SAME.

On the cross examination by defendant's counsel of one jointly indicted with defendant, a question as to whether the witness thought it would benefit to tell "that stuff," is properly excluded.

10. SAME—WITNESS.

Where one jointly indicted is withdrawn from the witness' stand to consult with his lawyer, a refusal to allow defendant's counsel to join in the consultation is not prejudicial, where it appears that it was in defendant's interest, and the result thereof is the refusal by the witness to answer any questions, on the ground that his answers will tend to criminate him.

11. SAME.

The objection that the attorney for the witness, and not the witness himself, made the claim of personal privilege, cannot be raised for the first time on appeal.

12. WITNESS—IMPEACHMENT.

After a statement by an impeaching witness to the general effect desired, and a specific denial of a fact is sought, the question should be such that the answer when given, if favorable, would amount to such a denial.

13. INDICTMENT—PROOF.

Under an indictment in the usual form, averring that the offense was committed with deliberation, premeditation and malice aforethought, and without averments as to its having been committed in an attempt to perpetrate robbery, the facts as to how the murder was committed, including the attempt to rob, may be shown.

14. CRIMINAL TRIAL—CHARGE.

On a trial for murder, a charge that the jury must not give any thought to the fact that defendant did not testify in his own behalf is not contrary to section 3636 of the Code. That rule, in its letter or spirit, does not apply to the court.

Appeal from a judgment convicting defendant of murder and imposing the death penalty.

W. H. McHenry, for appellant.

Milton Remley, Atty. Gen., Jesse A. Miller, and J. J. Davis, for the State.

GRANGER, J.—1. On the 19th day of May, 1894, one L. B. Ridpath, a passenger conductor, while on his way from his home to his train, in the city of Des Moines, was shot and killed. This defendant, John Hamil, and John Kraut were on the first day of June, 1894, jointly indicted for the murder, the offense being charged in the first degree. The cause was as to the defendant Weems called for trial July 9, 1894, resulting in a verdict of guilty of the crime as charged, and the jury recommended the death penalty.

A few facts may appropriately be stated in this connection. On the night that Ridpath was killed, the three defendants, as indicted, were together from about six or seven o'clock in the evening until the killing took place, which was on Third street near Center. They met on the east side of the river, at a house, and afterwards went to the west side, and visited two or three places together, when they went north on Fourth street to Center street. From the testimony of Kraut, who was a witness for the state, it is made to appear that while on Fourth street, and near Center, Weems said he had to have some money before morning, and said that he must have a suit of clothes in a certain length of time. While on Fourth street, either Weems or Hamil made

the remark that he "was going to hold up the first plug that came along." On Center street they all went east to Third street, and saw one man pass. Weems and Hamil talked of "holding him up," but it was said: "Them kind of people haven't got no money." Soon after, Ridpath came along, and Weems and Hamil crossed the street, and met him, and soon Kraut heard a pistol shot, and, looking, saw Weems and Hamil run away, and he crossed over, and saw that Ridpath was killed. Later in the evening, Kraut saw Weems and Hamil at Mrs. Whitcomb's, on the east side of the river, and Hamil inquired if the man was hurt, and he was told by Kraut that he was dead. On the 22d day of May, 1894, three days after the killing, Weems made a confession, which is in the abstract; and in most of the particulars, to the time the three men reached Third street, it corroborates Kraut substantially. This statement is so important that we give the part of it referring to what was done after reaching Center street. It is as follows: "Just as we got to Center street we saw a young fellow going east on the north side of Center street. Barney said: 'Shall I stick him up?' I said: 'No; he has got nothing. He is nothing but a kid.' Hamil said: 'I have a notion to hold him up anyhow. Those are the kind of people that generally have money.' We then started east on Center street to Third street, and started south on the west side of Third street, when we saw a man going south on the east side of Third street, carrying a satchel. He was about sixty feet north of us. Hamil and myself started diagonally across the street ahead of him, to hold him up, and Kraut was to stay on the west side of the street, and come over and help if he was needed. We got on the sidewalk about fifty feet south of the man that was shot. We walked down the street ahead of him, until we came to a large tree by the side of the walk. Just before we got to the tree, we met a man and women going north. Hamil was standing behind the tree; I, on the edge of the sidewalk. Just as the man came up to us, Hamil pulled the revolver out of his pocket, and said, 'Hold up your hands.' The man threw up his grip, and hit the revolver. As he hit it, it discharged it. Then Hamil grabbed the grip, and started to run. We both ran across the street, and into a blind alley. Hamil cut the grip

open. He got one large and one small leather pocketbook, and an ivory-handled revolver, out of the grip."

With this partial history of the case we may better present some of the questions to be considered.

2. On the 20th day of June, 1894, the defendants in the indictment. Weems and Hamil, made their application to change the place of trial, because (1) the minds of the people of the county had been poisoned and prejudiced against them by the publication, in all the daily newspapers published in the city of Des Moines, of "inflammatory and highly-colored, display-headed, double-headed accounts of what purported to be detailed recitations of the facts of the alleged crime, and connecting defendants with the same," which accounts are attached to the application as exhibits; (2) because the excitement had reached such a state that violence was threatened, and even attempted, against them, and the officers of the law were compelled to remove them, to protect their lives; (3) because the person killed was a railway conductor, and popular with all classes of railroad men, and the minds of such were especially appealed to, and poisoned and prejudiced against the defendants; and (4) because the lives of the defendants will be in danger of mob violence while on trial in the county. The application, besides being sworn to by Weems and Hamil, is supported by the affidavits of three parties, to conform to the laws in such matters. There is also an affidavit signed by nineteen others, residents and citizens of Polk county, in which they say that they "believe that the said defendants cannot obtain a fair and impartial trial in said county, because of the public excitement against the defendants, because of many inflammatory newspaper articles published in all the papers of said county, concerning the alleged crime of said defendants." The showing for a change is resisted by an affidavit of J. D. McGarrah, sheriff of said county, to the effect that he was absent from the county when said defendants were arrested; that some of his deputies, as a matter of overcaution, removed the defendants from Polk county on Saturday evening; that he returned on Monday after, and upon investigation to know if it was necessary for them to be kept out of the county, because of passion or feeling of the people of the county, he became satisfied that there was no such feeling or passion; and that on Tuesday

he brought them back into the county. He also states that he became satisfied that there was never any danger of mob violence, and that the crowd of people, men, women, and children, that assembled upon learning of the arrest, was composed of curiosity seekers, who were interested in the arrest of persons charged with crime. There were also affidavits signed by 295 inhabitants of Polk county, who say, each for himself, that he is acquainted with the people of said county, and knows their sentiments and feelings in relation to the case, against Hamil and Weems; that there are 100,000 inhabitants in the county; that only a small portion of the people of the county have given any attention to the facts of the case, or have particular knowledge of the case; that most of the people of the county are not only without prejudice, but have no knowledge whatever in relation to the case; and that defendants can have as fair a trial in Polk county as in any other county in the state. The court denied the application, and complaint is made of the ruling.

It will be well to here state that what is represented of the publications as to their being "highly-colored, display-headed accounts" of the affair is true. These exhibits cover about thirty pages of typewritten matter. Some instances of the headings are: "Murderers in Jail;" "John Kraut and John Hamil are under Arrest;" "Former has Confessed;" "It was a Robbery;" "Hamil is Caught;" "All are Captured;" "The Murderers of Conductor Ridpath Languish in Jail;" "Safe from the Mad Mob;" "All in the Toils of the Law before forty-eight Hours;" "Hamil and Kraut were Run Off to Newton, Iowa;" "From Whence They were Returned to the City To-day;" "Are Again in Jail;" "Sheriffs Guard the Jail;" and others of like tenor. The articles purporting to give the facts are much what the headings would indicate. As to the facts of violence if the cause should be tried in Polk county, nothing more need be said than that the defendant Weems was tried in the county without any such a result, or attempt at it. The application for the change was filed about the middle of June, and Weems, Hamil, and Kraut had been back in the county for some three weeks, and there is not a word in the showing for a change to prove that any person or persons had in any way contemplated violence, and the fact of their return had

been announced through the papers by prominent headings. In a legal sense, the same conclusion may be stated as to violence either attempted or threatened before the removal from the county jail. It is true that papers contained statements that a large concourse of people,—a mob,—to the number of 3,000 or more, assembled about the jail; that there were murmurs of lynching; that only a leader was needed to put threats of lynching into execution; and many like statements. These exhibits do not prove the facts as stated in them, nor tend to prove them. They are not evidence of such facts in any sense; nor are they used as such. The facts recited are unverified by the oath of any person. The exhibits are attached to the application, not to prove the facts recited in them, but to show what was put before the people, as indicating the effect upon their minds as to exciting them to violence or creating prejudice. Take the exhibits from the application, and there is not a word from any one, barring, perhaps, that of Weems and Hamil, by construction, that can be construed as meaning that there was danger of violence. The same considerations apply, materially, as to the question of the prejudice of the people, so that a fair trial could not be had in the county. In this respect it was proper for the court to consider the probable effect of such articles on the minds of the people. The showing of appellant is peculiar and unusual. Not an affiant states that he knows anything of the feelings of the people, or that he is acquainted to any extent with them. Nor are facts stated from which it can be understood that they have such knowledge. It is a bare statement that they are residents of the county, and believe that the defendant cannot have a fair trial, because of the excitement and prejudice caused by the articles published. It leaves on the mind little more, if any, than an impression that their conclusions are based on their judgment of what would be the effect of such publications. The showing, on the other side, is materially different. Each of the 296 persons stated his means of knowledge, and his conclusions are based thereon. The weight of truth, by comparison, is overwhelmingly against the fact of prejudice. Of course, this statement is made on the theory that we do not take as established the recitals in the

newspaper articles. They are not, as we have stated, to be considered as facts.

There is a claim, that while the people were assembled, the judges of the district court met in full sight and hearing of the mob, and consulted; the consultation resulting in the prisoners being removed to Jasper county. The only proof of such a consultation is a statement in one of the articles published, as follows: "Judges Conrad, Balliett, and Spurrier, and Deputy Sheriffs Matern and Compton, held a conference at about six o'clock, the result of which was not made public; but it is supposed the court instructed the officers as to the best mode of procedure, and to what extent they could go in case of a raid made on the jail." If we could accept this as a proven fact, it is plainly to be seen how different the facts are as to the conference from what is claimed. It does not appear where it was held, or that the removal was the result of it. The most that could be said of the conference is that because of an assemblage of people, whose purposes were unknown, a precautionary conference was held. Again, as to these articles, if they could be considered on questions of fact, they are so conflicting as to be absolutely unreliable. Notwithstanding the repeated statements as to the purposes of the mob, and that only a leader was necessary to have brought on a lynching, it is said: "At six o'clock last night a mob commenced gathering around the courthouse square, and at seven o'clock there were at least three thousand people present. It was an orderly mob, many ladies being present, and all drawn from curiosity." In quite close connection with this statement it is said: "About ten o'clock a wild-eyed agitator made a speech from the courthouse steps, and offered to lead the mob. He not only wanted to hang Kraut and Hamil, but Mrs. Michael Smith as well." No attention seems to have been paid to it. The men, when removed to Jasper county, were, by three deputies, led through the assembled crowd to the train, without an attempt at violence. The known facts and results are in plain contradiction of the facts, as to the real purposes of the people assembled, as expressed in the articles. This case, as to the facts, when confined to legal proofs, is unlike any other case considered by this court. The showing is widely different

from that in *State v. Billings*, 77 Iowa, 417, 42 N. W. 456; *State v. Canada*, 48 Iowa, 448, or *State v. Nash*, 7 Iowa, 347, to which reference is made. In those cases it will be seen that the affidavits in support of a change are of a different character. From those cases it will be seen that the district court in such matters possesses a large discretion, to be interfered with only in cases of abuse; and, applying the rule, there is no ground for disturbing the action of the district court in refusing the change.

3. On the 9th day of July, a motion for a continuance to the September term was filed and overruled. The grounds of the motion are that sufficient time had not elapsed for the public feeling and prejudice, as shown by the motion, to change the venue, to subside; that public justice does not require the trial of a person charged with a capital offense so soon as the first term after the commission of the alleged crime; that there had not been time to prepare for the trial; and that the defendant was without means, his attorney being appointed for his defense. The motion is unsupported in any way aside from its reference to the showing in the motion to change the venue, and what we may notice from the record. What has been said as to the showing of prejudice and excitement will suffice for that branch of this motion, for the proofs are the same. As to the other grounds of the motion, it may be said that there is no rule of law granting to the defendant, charged with a capital offense, time beyond the first term to prepare for trial. There was no showing of particular evidence needed that could not be had. Nor does it appear from the fact of the trial being had that there was prejudice because of a want of preparation. There was no error in the ruling.

4. At the empaneling of the trial jury, in answer to questions showing the competency to serve, some eight jurors so answered that their right to sit was challenged, and the challenge overruled. We need not set out the record as to all, but will set out the questions to two of them, and the answers. Mr. Stewart said: "I do not recollect any of the particulars that I ever heard about this transaction. I think my mind is free from bias." Question by Haskins, for defense: "You have formed the opinion, unqualifiedly, that Conductor Ridpath was murdered?" Answer. "Yes sir." By the state: "Did you form an unqualified opinion

that some one had been murdered or some one had been killed?" Answer: "I thought some one had been murdered." Later, in answer to a question by the state, he said: "I think I can give the defendant a fair and impartial trial, under the law and the evidence." Mr. Hatcher answered the same questions in the same way. At this point in the examination (others of the eight being also interrogated with much the same answers), the jurors were challenged, as having formed an unqualified opinion on a branch of the case. The court then said: "Gentlemen of the jury, do either of you know any reason why you could not sit in the trial of this case, and render a verdict according to the law and the evidence as it shall be given to you on trial? Do you know any reason why you could not thus sit as jurors in the trial of this case? If so, manifest it by raising your hands." No hands raised. The court: "Your silence is taken as an answer in the negative." Challenge denied. Mr. Hatcher further said in answer to a question by defendant: "I formed the opinion that he had been killed, and was killed wrongfully, by some one that had no right to kill him." Mr. Stewart was then asked: "That is the same with you? You formed the opinion that he had been killed and murdered?" "Yes." As to the others, the further examination was somewhat similar, and the challenge denied. The point is made in argument that the defendant was entitled to jurors who were not prejudiced against him on any material fact in the case. There is a practical concession in argument, and it is a fact, that the matters as to which opinions were previously formed were not in dispute on the trial; that is, there was no conflict. They became practically undisputed facts. This is important as to the fact of actual prejudice from the ruling. It is, however, said that this could not be known when the jury was impaneled, and the plea of not guilty put in issue all material facts; and that is true, and we may consider the proposition from that standpoint.

The fact that a juror has formed an opinion on one or more facts of the case has never been held as a sufficient ground of challenge. The Code (section 4405) defines what shall be a sufficient challenge in this respect in these words: "Having formed or expressed such an opinion as to the guilt or innocence of the prisoner as would prevent him from rendering a true verdict upon

the evidence submitted on the trial." It will be seen that, where an opinion has been formed, it is a question of fact for the court whether or not it is one that would prevent the juror from rendering a true verdict upon the evidence. See *State v. Munchrath*, 78 Iowa, 268 ; 43 N. W. 211. In this case no juror stated that he had formed an opinion as to the guilt or innocence of the defendant. In the *Munchrath* case several jurors said that they had read such evidence in the papers as that they had formed an opinion in regard to the guilt or innocence of the defendant ; that they had talked about the case ; and that it would require evidence to remove the opinions formed. The court in that case denied a challenge for cause, and the ruling was sustained. The facts showing prejudice in that case were far stronger than this. It is held in that case and in the other cases cited therein that " a person may form an opinion from reading newspaper accounts of crime, and from hearing others speak of it, and not be disqualified thereby from acting as a juror, provided the opinion so formed is not of such a character as to interfere with the rendering of a true verdict, on the evidence submitted on the trial." The court in this case determined, upon evidence submitted, that the jurors were competent, and there is no ground for our disturbing the finding.

5. A Mr. Luckt was a witness, and described a hat that Hamil wore on the night of the homicide. The following, from the record, will indicate the question next to be considered as briefly as otherwise : " Mr. Haskins: Before going further with this case, the defendant requests the presence of the co-defendant Hamil in the court room, he now being in jail ; and, the evidence being especially relative to the defendant Hamil, defendant's counsel requests his presence here for the purpose of consultation. By the court: The request will be denied. On yesterday, the accused, Hamil, was permitted to remain in court at the request of the counsel of this defendant, Weems, who is now on trial ; and, upon retiring from the room, the officers of this court, as a matter of precaution and safety, searched the accused, Hamil, and found on his person a bottle of alcoholic liquor, being secreted into the jail. For this and other reasons, this request is denied. (The defendant Weems excepts.) Mr. Haskins: The defendant in this

case takes exception to the statement of the court with reference to the conduct of the co-defendant Hamil yesterday, and takes exception to the statement of the finding of the alcoholic liquors, or anything else on the said Hamil's person, as being prejudicial to the rights of this defendant, and being improper, and no matter which should go before this jury, nor should it be mentioned in the presence of this jury. Court: Counsel for the defendant, earlier in the proceedings, this morning, suggested that he would like the presence of Hamil, and it was suggested to him that he could not be permitted to be present until he was needed, and gave him the reasons; and when I denied his presence, the counsel suggested that he wanted it in the record, and I then suggested to counsel the whole record would have to be made. It then appears, from statements of counsel, that he desired him for particular and special reasons. It will be seen that the only right denied was that of having Hamil continuously in court during the examination of the witness. There was no denial of the right to have him brought in when needed for such a purpose. In fact, that right was offered. The defendant had no legal right to claim the presence of Hamil in court for consultation, only in case he should desire to consult him. The record is silent as to there being a time when consultation was desired. The controversy seems to have been over the right of defendant to have him there, ready for consultation, instead of calling him if needed. It was a matter within the discretion of the court.

Exception is taken to the remarks of the court as to the whisky Hamil had in his pocket the day before, and it is said that was not a sufficient reason for denying his presence. It does appear that that was one reason why he was excluded, and there were others which seem to have been given counsel, but they do not appear in the record. Even though we might say that the fact as to the whisky was not a sufficient reason to deny what would otherwise be a legal right, we cannot say but that other reasons were sufficient. We cannot assume that they were not. That the reference to the whisky was prejudicial to the defendant is a mere assumption. No reasonable person would have permitted an act of Hamil to affect the defendant, on trial, for an act which it could be seen he was in no way responsible for.

6. One Mary Thomas was a witness for the state. Her name was Mary Temple when she was before the grand jury, and her name thus appears on the indictment. She testifies to having seen the three men at Jeannette Allen's on the night of the homicide. This was the only point as to which she gave evidence. On cross-examination she was asked many questions, such as: "What was the character of Jeannette Allen's house?" If it was not a sporting house. If she was not an inmate,—not a prostitute. If she had not been in court within a year, under the name of Hirshman, and prosecuted others under that name. These questions were all excluded, and the rulings are said to be in error. The extent of such inquiries, on cross-examination, is largely discretionary, with the court. Such an examination often tends to show the value of the testimony given, and is, within the proper limits, cross-examination. *State v. Row*, 81 Iowa, 138; 46 N. W. 872. Even if the questions were proper, there is not prejudice from the rulings. Their only purpose would have been to test the value of her direct testimony, and that was as to the single fact that the men were at Jeannette Allen's on the night of the homicide. That fact is not to be questioned in the case. Even the defendant, in his confession made three days after the killing, says they were there, and that he played on the piano. Still further, it may be said that, after the absolute disclosures that Hamil and Weems were the persons who met Ridpath when he was killed, the fact as to their having been at Jeanette Allen's became immaterial. It was only important, at first, in tracing the identity of the men.

7. John Kraut was a witness for the state, and against objections, he was permitted to testify that, when the three were at Mrs. Whitcomb's, on the east side of the river, before going to the west side, there was a black-handled revolver in the room, and the revolver described. This is said to be error, because the revolver is not shown to be connected with the case. It was not error. The mere fact that there was an attempt to identify that as the pistol used, and the attempt failed, does not render the evidence of the attempt immaterial, so as to make the admission of it error. It is often the case that much of the testimony admitted becomes useless before the conclusion of the trial, but it was not

for that reason error to admit it. That fact is noticeably true of this case. The same may be said as to other questions asked of Kraut, and admitted.

One other question we notice. On cross-examination defendant's counsel sought to show that he was giving his testimony with the hope of benefiting himself, and escaping criminal prosecution, and the following appears in the record: "Q. Did not your attorney tell you this, that you had better testify to enough to let you out of it, and it would go easier with you? (Objected to as incompetent, irrelevant, and improper, and asking for advice of counsel. Sustained, and defendant excepts.) Q. And is not the idea in your mind, coming on the stand here now, it is going to benefit you to tell that stuff? (Same objection. Sustained, and defendant excepts.)" No question is made as to the refusal of the first question, but it is urged that it was error to exclude the last. In the sense in which the question is taken, ~~an~~ argument, the exclusion would have been error, because the jury had a right to know with what motive he gave his testimony. It went to his credibility. But the question, as asked, was incompetent and improper for more than one reason. The second question, by the use of the word "and," couples it to the first question, so that the answer to the one is an answer to both, when the former had been excluded. A question thus framed might well be excluded as incompetent, because of its likelihood to induce an answer to one part of it not intended. Witnesses are often unguarded in such cases. Had the witness said "Yes" to the last question, it would have been the same answer to the first question. As counsel for appellant does not seem to think the questions are united, there is good reason to think the witness might make the same mistake. But the question is faulty in another respect. By the use of the word "stuff," it characterizes the testimony as such. "Stuff," defined means "trash; nonsense; foolish or irrational language." Its evident meaning in the question is "falsehood." Had the witness said "Yes" to the question, intending to state his idea as called for by the question, he would have said, inferentially, that what he had testified to was stuff. It is hardly necessary to state that

such a question is incompetent. Its likelihood to betray one into an implied acknowledgment of a fact not intended is enough to condemn it.

8. Hamil was called as a witness for defendant, and after stating that he was with Weems and Kraut on the east side of the river, and started for the west side, the following took place: "Mr. Haskins: The attorney for Mr. Hamil (before proceeding further in this case; I may have possibly been hasty) requests permission to take his client, Mr. Hamil, and have a private conversation with him, before he goes ahead with the case. Court: Very well; stand aside. Mr. Davis: I shall object to the defendant in this case going with the other party. (Objection sustained, and defendant excepts.) Court: That will not be allowed; he can talk with his client, but not with this defendant. Mr. Haskins: The request is made, on part of this defendant's counsel, that he be permitted now to retire and consult with Hamil and his attorney. Court: The request is denied, and defendant excepts." This action of the court is severely criticised, on the theory that the defendant has been denied the right to consult his witness before the examination, and that defendant's attorney was denied the right to examine the witness before he examined him on the trial. Neither of such rights was denied. The attorney for defendant in this court was not the attorney on the trial below, and this fact may have lead to some misapprehension. The consultation was in the interest of Hamil, to determine the course he should take in his examination, as will be seen in the consideration of the next point in the case, and the result of the conclusion was his refusal to answer the questions. It does not appear what induced the objection to Weems going with Hamil and his attorney; but the objection, with the ruling, seems to have induced Mr. Haskins, as attorney for Weems, to request that Weems be permitted to retire, and "consult with Hamil and his attorney." There is not a word to indicate that the consultation was in the interest of Weems. The defense had put Hamil on the stand, and the examination was interrupted by a request that his

(Hamil's) attorney be permitted to consult with him; not that the defense wanted such a consultation. There is nothing of which the defense can complain.

9. After the consultation between Hamil and his attorney, he was recalled to the witness stand, and under advice of his attorney, Mr. Dyer, he declined to answer any of the questions asked of him, for the reason that the answers would tend to criminate him. Several questions were asked, and Mr. Dyer would present the objection, except that when the point was made that the privilege was personal to the witness, and he must exercise it, he would make the objection himself. The complaint is as to the interference by Mr. Dyer, whereby the witness was interrupted, and, with the aid of counsel for the state, the witness was kept from answering. The record fairly warrants a belief that there was no division of sentiment, between the counsel for defendant and that of Hamil, as to the method of procedure. Counsel for Weems asked the questions which Hamil declined to answer, and saw all that took place, without a word of dissent or disapproval. The request for consultation, leading to the refusal to answer, was made by him; and to the result, as disclosed, he took no exceptions, not even to the rulings of the court sustaining the refusals. The criticism upon the action of the court in this regard is without any foundation.

10. Barney McBride was in the cell with Hamil and Weems when they were confined in the jail, and, as a witness for the state, said he had a talk with Hamil and Weems, in the presence of one Sweetman, about the man who was killed on the railroad track, and Hamil said, in the presence of Weems: "If a railroad kills anybody, there is nothing thought of it, but, because we got the best of a railroad man, they want to drive us off the face of the earth." Sweetman was afterwards called for defendant, and, after stating that he was in the cell with McBride, Weems, and Hamil, he said: "He never heard him talk to Weems and Hamil about the Ridpath murder, nor any talk with him. Neither of them withdrew and talked with him. Never heard any conversation between Weems and Hamil about the

Ridpath murder." The witness was then asked: "Did you hear Hamil or Weems say to McBride this, in substance: 'The railroad company can kill a man, and nothing is said about it; but, now we got the best of railroad men, they want to run us off the earth,'—or something like that?" If this question had been so framed that an answer might have contradicted McBride, it would certainly have been a proper exercise of discretion to have admitted it, although the witness had already stated the same thing by saying that he had heard no talk on the subject between them. However, it is generally admissible to permit a question directly expressing the particular facts to be contradicted, in order to render certain the effect of the evidence. But in this case the question did not call for an answer that could directly, even if it could by inference, contradict Sweetman. McBride's statement was: "Because we got the best of a railroadman, they want to drive us off the face of the earth." The question to Sweetman is: "'Because we got the best of the railroad men, they want to drive us off the face of the earth,'—or something like that." A negative answer would have been a very uncertain meaning, both because McBride's language, in the light of the record, referred to Ridpath, while the question to Sweetman seems to refer to railroad men generally, and, again, the question ends with the words "or something like that," and the witness was left to say, in his mind, what would be something like that. While, in many cases, such questions are used in practice, and may be allowable, what we say is that after a statement by a witness to the general effect desired, and a specific denial of a fact is sought, the question should be such that the answer, when given, if favorable, would amount to such a denial.

One Williams was also in the cell at the time, and he testified for defendant that Weems, Hamil, and McBride had no talk about the Ridpath murder. He was then asked if the three, at any time, retired for a secret conversation. While the question might have been admitted, there is no error in its exclusion, for there was no such fact in evidence to be contradicted. Its purport must have been to guard the jury against assuming a

fact without evidence, or dealing with such fact as a probability. No reason appears for disturbing the action of the court in this respect.

11. The indictment is in the usual form, averring that the offense was committed with deliberation, premeditation, and malice aforethought, and without averments as to its having been committed in an attempt to perpetrate robbery. It is now contended that evidence that the killing was done in such an attempt is improper, because of the absence of such averments. It is not to be doubted that murder in the first degree, charged to have been committed deliberately, premeditatedly, and with malice aforethought, may be shown, even though, in committing the murder in the manner charged, the acts showing an intent to rob would be involved; that is, if a person, in an attempt to rob another, willfully, deliberately, etc., kills him, he may be convicted of a willful and deliberate murder, and, in doing so, the facts as to how he committed murder, including his attempt to rob, may be shown. Now, conceding that the offense must be shown to have been committed in the manner charged to warrant a conviction, there is no error in the respect suggested, for the court required by its instructions that, before there could be a conviction, the facts must be found as charged in the indictment; and the facts as to lying in wait and as to robbery, both of which are shown by the evidence, were but links in the chain of evidence to show the facts of malice, deliberation, and premeditation, as charged in the indictment. This conclusion is in harmony with, rather than against, the rule of *State v. Baldy*, 17 Iowa, 39; *State v. Potter*, 28 Iowa, 554; *State v. Brandt*, 41 Iowa, 593.

12. The first part of the third instruction is as follows: "If two or more persons conspire or confederate together to commit an unlawful act, and, in pursuit of such conspiracy and commission of such unlawful act, such persons, or either of them, aided and abetted by the others, takes the life of or kills a human being, such taking of life is murder." It is said that the language thus quoted states an erroneous rule of law. If it be con-

ceded that it is legally inaccurate in the use of the words "an unlawful act," as contended, nevertheless the remainder of the instruction, which is only separated from the other by a semicolon, and gives the application of the rule to the facts of the case, fixes the unlawful act to be considered as robbery, and only permits a conviction on the finding of the facts as charged in the indictment in an attempt to perpetrate robbery. Thus considered, the instruction involves no error.

13. Some instructions asked by the defendant were refused. In so far as they involved correct rules, they are covered by those given by the court; not, however, in the same or even similar language, but the rules are included, and a right of conviction denied, under the facts as given in the instructions asked.

14. The court gave the following instruction, of which complaint is made: "Sixteenth. Under the statute of the state, the defendant had the right to testify in his own behalf, or not, as he might elect; and, if he declined to so testify, it shall not be considered against him; and in this case you are instructed that you must not give any thought to the fact that the defendant did not testify in his own behalf." It is said the court had no right to refer to the matter of the defendant's failure to testify. The claim is based on Code, § 3636, which provides that, where a defendant does not elect to become a witness, the fact shall not have weight against him on the trial, nor shall the attorney or attorneys for the state during the trial, refer to the facts that the defendant did not testify in his own behalf. That rule, in its letter or spirit, does not apply to the court. The instruction was in the interest of the defendant, and was induced, likely, by an apprehension that the jury might of its own motion consider the fact that the defendant did not take the witness stand to testify and draw improper inferences therefrom. Certainly, the instruction could have done no harm.

There are some few questions that we have not noticed directly, but all of which are controlled by the points decided. We have given the case, because of its great importance, involving human life, patient and careful attention. The facts, in the main, are

not in doubt. They are practically confessed. The motives and purposes that induced the killing, or whether it was accidental, are all that can be said to be doubtful. The finding of the jury upon the question has ample support in the evidence.

The judgment will stand affirmed.

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. HAMIL.

CRIMINAL LAW—CHANGE OF VENUE.

The refusal of a change of venue on the ground of prejudice, where the examination of the jurors shows no error in determining their competency by reason of opinions formed, is harmless.

Appeal from a judgment convicting defendant of the crime of murder in the first degree.

E. B. Evans, for appellant.

Milton Remley, Atty. Gen., Jesse A. Miller, and J. J. Davis, for the state.

ROTHROCK, J.—The defendant was jointly indicted with George Weems for the murder of L. B. Ridpath. They were separately tried, at the same term of court. Weems was tried and convicted first, and the trial of Hamil occurred immediately afterwards. Weems appealed, and the judgment and sentence against him were affirmed at the present term of this court. *State v. Weems*, 65 N. W. 387. Nearly all of the questions in this appeal are disposed of in the opinion in the appeal of Weems. The two cases have been considered together, and it will be necessary only to dispose of such questions in this case as did not arise in the other.

After the joint application for change of venue was overruled, Hamil renewed the motion, and filed some additional affidavits. The motion was again overruled. Another motion for a change of venue was made, pending the impaneling of the jury. There were no additional affidavits filed in support of this last motion. The defendant also filed an affidavit that the judge before whom the case was tried was prejudiced against him. We have examined all these proceedings, and they appear to us to present no stronger showing than that made on the joint application for a change, the overruling of which we have sustained in the other appeal. They show that the newspapers of the city, in reporting the Weems trial then in progress, published articles condemning the murder and the murderers in about the same manner as they did before the trial commenced, and the claim was made that the public trial of Weems prejudiced persons who were called to sit upon the jury in the trial of Hamil. We think all this contention should be disposed of by the single consideration that the actual record as made on the impaneling of the jury shows that the court did not err in rulings on challenges to jurors, and in determining that the jurors had not formed such opinions as would preclude them from rendering a just and impartial verdict, upon the evidence and the law as given to them by the court.

Objection is made to part of the charge of the court to the jury. The instructions complained of were given on the trial of Weems, and the same objections were made in that case. We do not think it necessary to give them further consideration than we have in the other case. Such as are not specially mentioned in the opinion in that appeal do not appear to us to have sufficient merit to require discussion. The same may be said of other questions presented on this appeal.

The judgment of the district court is affirmed.

K.

Supreme Court of Iowa.

Filed December 14, 1895.

STATE v. DELONG.**ASSAULT WITH INTENT TO RAPE — SUFFICIENCY OF EVIDENCE.**

The evidence, in this case, was held sufficient to convict defendant of assault with intent to commit a rape, and further held that, if defendant acted toward prosecutrix, before going upstairs, as she testified he did, the crime was then complete, though she consented to what transpired afterwards.

Appeal from a judgment convicting defendant of the crime of assault with intent to commit rape.

Temple & Hardinger, for appellant.

Milton Remley, Atty. Gen., for the state.

ROBINSON, J.—1. The indictment charges that in May, 1892, the defendant made a felonious assault upon one Emma S. Gracey, with the intent to ravish and carnally know her against her will. The testimony shows that the defendant visited the home of Emma S. Gracey on the 10th day of June, 1892. At that time she had been married about six weeks, and was living on a farm with her husband. The house they occupied stood fifteen or twenty feet west of, and facing, a public road which extended from north to south. A door in the front of the house opened into the sitting room, in the south part of which was a bed. In the northwest corner of the room was a door which opened into the kitchen. In the southwest corner of that was an outside door, which opened to the west. In the northwest corner of the kitchen was a door which opened into the stairway. This was winding at the bottom, and was inclosed on one side by a plastered wall and on the other by ceiling. It led to a space or room which, we understand, was over the kitchen, and from that room there was an opening or way to a room over the front lower room. Mrs. Gracey was nineteen years of age and

and had been acquainted with the defendant about ten years. They had attended the same public school, spelling schools, church, and Sunday school; but she states that she had never "kept company" with him, and that he had never gone anywhere with her. About two o'clock in the afternoon of the day specified, the defendant passed the house riding a horse northward. The prosecutrix and her husband were then in the sitting room, and saw him. After a short time he returned, tied his horse to the fence in front of the house, went westward to the field where the husband was then at work, and made inquiries about the cattle which he claimed had strayed. He then went back to the house. What there occurred is a matter of dispute. Mrs. Gracey's account of the affair is substantially as follows: She was upstairs when she heard a knock at the front door, and in response descended. The main door was open, but the doorway was closed by a screen door, which was unfastened. The defendant stood at the front door outside, and after some words of greeting asked if she had seen any stray cattle. She answered that she had not; and he then came into the sitting room, without being invited to do so, and seated himself in a chair a few feet south of the front door, and near the bed. Mrs. Gracey seated herself about the same distance north of the door. The defendant then remarked that a couple he named had married to spite her. She replied that the marriage didn't spite her any, as she had no interest in the parties. The two then sat in silence for some time. The defendant did not by his manner indicate any wrong design, and Mrs. Gracey was not alarmed. The silence was broken by the defendant suddenly declaring that he would have sexual intercourse with her. She said he should not. He declared he would, and she at once started for the door leading to the kitchen, to go through the kitchen and out towards her husband. The defendant followed, overtook her when she was near the middle of the kitchen, seized her by one arm, cursed and threatened her, opened the stairway door, and forced her to ascend, and to pass to the front upper room. When there he compelled her to take a bed comforter from the bedstead and

denies that he compelled her to place the comforter on the floor, throw it on the floor. He then threw her upon it and attempted to have sexual intercourse. She resisted him successfully, and he finally desisted and departed. She made no outcry, and her clothing was not torn. The defendant was twenty-one years of age at the time, and testified in his own behalf. He states that when he knocked at the door Mrs. Gracey came to it, unhooked the screen door, and invited him to come in and be seated. He denies that he threatened her or seized her; denies that she ran from him; denies that he forced her to go up the stairway; and or that he threw her down. He further states that he did nothing while there to which she objected, and that she was in a good humor when they parted. He does not deny that he attempted to have sexual intercourse with her, and evidently desires the jury to understand that he accomplished his purpose, and that she fully consented to it from the first. There are, undoubtedly, circumstances which tend strongly to corroborate his theory of the transaction. The statements of Mrs. Gracey are not in all respects reasonable, and in several important particulars they conflict with her testimony given on a former trial of the case. She made no attempt to alarm her neighbors, although one lived only forty or fifty rods away, and another was nearer. The defendant insists that, if she was alarmed at anything he said or did, she could easily have passed out of the front door to the road, where she would have been safe, and that the fact that she went into the kitchen instead is an indication that she did not desire to avoid him, but rather to encourage his advances, and that if she had resisted him, as she claims to have done, her person and clothing would have shown marks of a struggle. What a woman should do in the situation in which Mrs. Gracey was placed cannot be determined by any fixed rules. Perhaps no two women would do the same thing. With many, the desire to avoid publicity would influence their attempts to resist assault or flee from danger. The dread of being found in a situation most loathsome to every modest and virtuous woman might induce some to rely on other means to protect their

virtue than public outcry. Others, stupefied by shame or fear, might fail to make use of the means of escape which would be most apparent and promising to a person free from excitement. What Mrs. Gracey did in this case, when alarmed, was most natural. To have gone towards the front door would have been to approach nearer to the defendant, and to have made an outcry would have been to court publicity. Moreover, she did not know that any third person was within hearing. Instead of doing these things, which, with all the facts before us, we can see would have been best for her to do, she went from the defendant to the kitchen, and towards the outside kitchen door and her husband. That she did this for the purpose of avoiding the defendant and preventing his embraces, and that he pursued her and seized her, with the intention of accomplishing his purpose notwithstanding her resistance and against her will, the jury may well have found from the evidence. Marks and bruises on her arms, which she testifies were made by the defendant when he seized her, and while he was forcing her up the stairway, and which might well have been so made, were plainly visible more than a week after the occurrence. The statements of Mrs. Gracey which may be regarded as not entirely reasonable, and as conflicting, relate almost wholly to what transpired after she was seized in the kitchen, and after the defendant had commenced to force her up the stairway. She testifies that she had been unwell, and had been confined to her bed a part of the time only a day or two before, and that she was physically weak. Notwithstanding this, there is reason to believe that she might have offered greater resistance than that she testifies to, and it is possible, as claimed by the defendant, that she yielded to him voluntarily. It is not necessary, however, to determine the facts with respect to that controversy. If the occurrences prior to the time she ascended the stairway were as she claims, and as the jury were authorized to find, the crime of which the defendant is convicted was complete, even though everything done thereafter was with the consent and according to the desires of the prosecutrix. *State v. Atherton*, 50 Iowa, 191; *State v.*

Cross, 12 Iowa, 68. We conclude that the verdict is sustained by the evidence.

2. Complaints are made of the giving of certain portions of the charge, of the refusal to give certain instructions asked, and of remarks made by an attorney for the state in his closing argument to the jury. We do not find that any of these complaints are well founded. The jury were carefully instructed, and the argument objected to was not improper. We find no ground for disturbing the judgment of the district court, and it is affirmed.

DEEMER, J.—I do not think the defendant is guilty of any offense greater than an assault and battery; and on the authority of *State v. Pilkington* (Iowa) 60 N. W. 502, and *State v. Briggs* (Iowa) 61 N. W. 417, and the rule that before one can be convicted of this offense it must appear that defendant intended to gratify his passions notwithstanding any possible resistance prosecutrix should make, I respectfully dissent from the conclusions of the majority in this case.

Supreme Court of Iowa.

Filed December 14, 1895.

STATE v. GASTON.

1. CRIMINAL LAW—RAPE—INSTRUCTIONS.

Failure to instruct is no error when a specific instruction was not asked, and the point was covered by the general charge. So held on the trial of an indictment for carnally knowing a female child, where evidence was received of defendant's carnal knowledge of prosecutrix in another county, and the court failed to specifically instruct the jury that the evidence was admissible only to show the relation of the parties, but defendant requested no such instructions, and the court charged that, before the jury could convict, they must be satisfied that he carnally knew prosecutrix at the time of the charge

2. SAME—INDICTMENT.

The counts in an indictment for rape do not each charge the same offense, so as to render a dismissal of the first an acquittal of the second, where the first count is in the ordinary form of one for rape of a female over thirteen years of age, except that prosecutrix is described as a "female child," and the second count is for carnally knowing a female child under thirteen years of age, the same female being named in each count.

Appeal from a judgment convicting defendant of assault with intent to commit rape.

Matt Gaasch and T. H. Milner, for appellant.

Milton Remley, Atty. Gen., for the state.

DEEMER, J.—The defendant is the foster father of the prosecutrix, who is a female under thirteen years of age. A short time prior to the time it is said the offense was committed, these parties lived in Fayette county. The state, over the objections of the defendant, was permitted to prove that defendant, during the summer of 1894, had carnal knowledge of the girl in Fayette county. It is now practically conceded that this testimony was admissible for the purpose of showing the relations and dispositions of the parties; but it is contended that the court erred in not specifically instructing the jury as to the purpose for which this testimony was admitted. Defendant asked no such instruction, and the court gave none, other than the general ones with reference to the weight and credit to be given to the testimony of the various witnesses, except to say, plainly and explicitly, in at least two instructions, that, before the jury could find the defendant guilty, they must be satisfied beyond a reasonable doubt that at the time and place charged, which was in Benton county, the defendant did carnally know and abuse the prosecutrix. It is quite evident that the jury understood that they could not convict the defendant of any crime he may have committed in Fayette county. The evidence tended to show that, before coming to Benton county, the defendant was in the habit of sleeping with the girl, who was then twelve years of age, and that he

frequently attempted or had sexual intercourse with her. The state claimed, and the evidence tended strongly to show, that these illicit relations and conditions prevailed between these parties after they came to Benton county. The purpose of admitting the testimony objected to is so clearly apparent that we do not think there was prejudicial error in failing to instruct with reference to this subject, especially in view of the fact that no such instruction was asked by the defendant. See *State v. Watson*, 81 Iowa, 380; 46 N. W. 868.

2. The indictment is in two counts,—the first charging that the defendant unlawfully and feloniously made an assault upon, and did then and there feloniously ravish and carnally know, Grace E. Gaston, forcibly and against her will; the second, that he, with force and arms, did make an assault, and then carnally knew and abused the said Grace E. Gaston, she then and there being a female child under the age of thirteen years. At the trial the state dismissed the first count, and the conviction was had upon the second. In the first count it is alleged that the crime was committed on the 17th day of December, 1894. In the second it is said that the crime was committed on the 17th day of December, omitting the year. It is claimed that, as the second count does not name the year, the indictment on which defendant was tried and convicted was fatally defective, and that the court erred in charging the jury that it was alleged to have been committed December 17, 1894. It has been held by this court that where time is not a material ingredient of the offense charged, the precise time need not be alleged, nor proved as alleged. *State v. Wambold*, 72 Iowa, 468; 34 N. W. 213; *State v. Deitrick*, 51 Iowa 467; 1 N. W. 732. But, without holding an indictment good which fails to state any year, we think our Criminal Code of Procedure fully meets the objection here urged, wherein it provides, at section 4306, that “no indictment is insufficient, nor can the trial, judgment or other proceedings thereon be affected for want of an allegation of the time or place of any material facts when the time and place have been once stated.” Section 4305 also provides that the indict-

ment is sufficient if it can be understood therefrom that the offense was committed at some time prior to the finding of the indictment. Another section (4300) provides that "the indictment must charge but one offense, but it may be charged in different forms to meet the testimony." No objection is urged to the indictment on account of duplicity, and it is apparent it was constructed, as we find it to be, under this last section, to meet the testimony; so that it relates of necessity to but one transaction. It charges, in the first count, that the crime was committed December 17, 1894, and therefore the time has "been once stated;" and it meets the requirements of section 4306. It is insisted, however, that, as the first count was dismissed by the state, nothing remained to fix the date. This contention is not sound, for the reason that the dismissal by the state of the first count did not eliminate it from the indictment. It still remained as a part of the presentment, and the whole instrument should still be considered, in determining its sufficiency. This exact question was presented in the case of *Wills v. State*, 8 Mo. 52, and the point was ruled adversely to appellant's contention.

3. Lastly, it is insisted that the dismissal of the first count amounted to an acquittal on the second, because both charged the same offense. The first count is in the form of an ordinary indictment for rape of a female over the age of thirteen years, except that it is alleged that the said Grace E. Gaston was "then and there a female child." Claim is made that by the use of the words "female child" it is evident that the offense charged in this count is the same as the one charged in the second, which clearly charges the carnal knowledge and abuse of a female child under the age of thirteen years. We do not think this is a tenable position. The word "child" had a broader meaning than appellant's counsel would give it. The word is quite frequently applied to any young person, at any age less than maturity, and is often used in the broader sense of offspring. We think it is clear that, as used in this indictment, it means that the prosecutrix was immature, and that it would be a forced construction to say that it meant she was under thirteen years of age.

We have gone over the entire record with care, and discover no error. Affirmed.

Supreme Court of South Dakota.

Filed December 16, 1895.

STATE v. ISAACSON.

1. INDICTMENT—INSUFFICIENT.

An indictment under the statute, direct and certain as to time, place and the party charged, is ordinarily sufficient, if the offense is described substantially in statutory language, fully apprising the accused of the nature and particular circumstances of the charge against him.

2. SAME—NAMES OF WITNESSES

Although the statute requiring the names of all witnesses examined before the grand jury to be placed at the foot of the indictment or indorsed thereon is mandatory, the overruling of a motion to quash, made after plea, and for the reason that a name has been omitted, is not prejudicial where the witness is not allowed to testify on the part of the state, and it clearly and affirmatively appears that the accused was not injured by the exercise of the court's discretion.

3. WITNESSES—NOTICE.

Before the trial commenced, counsel for the prosecution, in open court, gave oral notice that certain witnesses not examined before the grand jury would be called on the part of the state, and it was held not necessarily error to allow such witnesses to testify, over an objection that said notice was not in writing and given at an earlier date.

4. APPEAL—AFFIRMANCE.

A careful examination of the record as presented discloses no erroneous ruling of the court on the admission or rejection of evidence, for which judgment of conviction should be reversed.

Appeal from a judgment convicting defendant of maliciously exposing poison.

Thomas L. Bouck, for plaintiff in error.

Coe I. Crawford, Atty. Gen., and S. S. Lockhart, for the state.

FULLER, J.—Under section 6884 of the Compiled Laws, plaintiff in error was indicted for, and upon the trial found guilty of, the offense of maliciously exposing a poisonous substance, with the intent that the same should be taken by an animal, to wit, a certain horse. Omitting formal recitals, the indictment is as follows: “That Peter Isaacson, late of said county, yeoman, on the tenth day of May, in the year of our Lord one thousand eight hundred and ninety-five, at the county of Grant and the state of South Dakota, did commit the crime of maliciously exposing poison, with intent that the same shall be taken by an animal, committed as follows, to wit: That at said time and place the said Peter Isaacson did willfully, maliciously, unlawfully, and feloniously expose a certain poisonous substance, called ‘strychnine,’ with the unlawful, malicious, and felonious intent that the same should be taken by a certain animal, to wit, a horse, which said horse was then and there the property of one Albert C. Larson, which said poisonous substance, so willfully, maliciously, and feloniously exposed by said Peter Isaacson, as aforesaid, was then and there taken into the stomach of said horse, from the effects of which poisonous substance, so as aforesaid taken into the stomach of said horse, the said horse then and there, on said tenth day of May, in the year one thousand eight hundred and ninety-five, died.”

Upon the ground that the indictment did not state facts sufficient to constitute a public offense, a demurrer was interposed, and the action of the court in overruling the same is assigned as error. The indictment appears to be substantially in the language of the statute creating the offense, direct and certain as to time, place, and the party charged, and the particular acts constituting the offense are set forth in ordinary and concise language, apprising the accused fully of the nature of the charge against him. In our opinion the demurrer was properly overruled.

After plaintiff in error had entered a plea of “not guilty,” and before the case had proceeded to trial, his counsel learned for the first time that the name of a witness examined before the grand jury had not been inserted at the foot of the indictment

or indorsed thereon, and a motion to set aside the indictment, based upon that ground, was made, and overruled by the court, as coming too late. Counsel for the accused then asked leave to withdraw the plea of "not guilty," for the purpose of renewing his motion to quash the indictment upon the ground above specified. The court in effect stated that the motion was made too late, and the application to withdraw the plea and move to set aside the indictment was denied. This ruling is assigned as error, and counsel maintains that the court in effect declined to exercise its discretion, and the accused being thereby injured, the case is brought within the rule announced by this court in *State v. Van Nice* (S. D.) 63 N. W. 537; but we think the cases are clearly distinguishable. In the *Van Nice* Case the court declined to consider the application upon its merits, or exercise its discretion, for the express reason that by pleading to the indictment the defendant had, in the opinion of the court, placed the subject-matter of the motion beyond its power and jurisdiction; but in this case the court exercised its discretionary power, and refused to grant the motion, because the accused had by his plea deprived himself of the absolute statutory right to have the indictment quashed, and had placed the matter within the exercise of a sound judicial discretion. Furthermore, the case of *State v. Van Nice* was reversed because the accused was prejudiced by the refusal of the court to exercise its discretion, in that the grounds upon which the motion was based, if established, would have been fatal to a verdict. In this case the witness before the grand jury whose name was omitted from the indictment was in court, and made an affidavit in defendant's behalf, in support of the motion to set aside the indictment. The insertion of the name at the foot of the indictment would not more fully apprise plaintiff in error that the witness had testified before the grand jury than his affidavit to that effect read in open court before the trial commenced; and in view of the fact that upon the objection of the accused the witness was not allowed to testify upon the trial on the part of the state, but might have been called by the defendant, no prejudice could result from

the ruling of the court upon the motion to quash the indictment. The provision of section 7236 of the Compiled Laws, requiring the names of all witnesses examined before the grand jury to be placed upon the indictment is mandatory (*State v. Stevens*, 1 S. D. 480, 47 N. W. 546); and unless such names are inserted at the foot of the indictment or indorsed thereon, the indictment must be set aside, provided the motion to quash for that reason is made before a plea to the indictment has been entered (Comp. Laws, §§ 7283, 7284, 7286). After such plea, it is clearly within the discretion of the court to allow the same to be withdrawn, and to entertain a motion to set aside the indictment. *State v. Van Nice*, supra. Where a person indicted for a crime has inadvertently entered a plea without moving to quash upon an existing, though subsequently discovered, ground, which would have been fatal to such indictment if urged before the entry of the plea, the practice to permit a timely withdrawal of such plea, and to entertain a motion to set the indictment aside, has the sanction of usage, and is always commendable when allowed in the interest of justice. The matter being, however, within the sound legal discretion of the court, the burden was upon plaintiff in error to show substantial injury, and as the absence thereof affirmatively appears, the ruling of the court upon the motion to quash the indictment will not be disturbed.

Before the trial commenced, counsel for the prosecution gave oral notice in open court that certain witnesses not examined before the grand jury would be called on the part of the state, and in view of our statute there is no merit in the contention that such witnesses should not have been allowed to testify, because the motion was not in writing and given at an earlier time. *State v. Church* (S. D.) 60 N. W. 143, and cases there cited.

Over the objection of counsel for the accused the prosecuting witness and owner of the horse mentioned in the indictment was allowed to testify as follows: "As soon as the horse died, Andrew Melander and myself cut the horse open and took out the contents of his stomach. I administered some of the contents of the stomach of said horse to a hen on the 11th day of

May, 1895, and the hen died in ten or twelve minutes from the effects thereof." We think the evidence as to what he did was admissible. A nonexpert, shown to be familiar with evidentiary facts, may, when the expression of an opinion is not involved, ordinarily state the result of his observations with reference to such facts. An ordinary nonprofessional witness in possession of his faculties, who takes a section from the stomach of a horse, and feeds it to a hen, which dies in ten minutes after eating the same, may testify as to such facts, when material, for the same are as observable to him as to a professional witness. The objection, as made, did not go to the qualification of the witness, but was specifically directed to the evidence "relating to the administration of said contents to said hen," and not to the opinion of the witness as to the causes of the hen's death; and as no motion was made to strike out such evidence, counsel's contention concerning the same cannot prevail. The witness further testified that he applied to his tongue a substance which a doctor told him was strychnine and afterwards applied his tongue to some of the contents of the horse's stomach, which tasted like the substance given him by the doctor. This was not objected to as hearsay testimony, and, no motion to strike the same out having been made, we would not be justified in reversing the case upon the assignment of error relating thereto. The state's attorney was allowed to propound a leading question to a witness, apparently hostile to the prosecution, but as the matter to which the question related was merely introductory, and the answer was without probative force, the question was allowed, and no injury resulted therefrom. The evidence of threats made by the accused at different times and places during the year immediately preceding the indictment, to the effect that he would kill animals owned by the prosecuting witness, was entirely competent. A regardful examination of the record as presented discloses no prejudicial error, and the judgment of conviction is affirmed.

Supreme Court of Michigan.

Filed December 24, 1895.

PEOPLE v. SHAVER.

1. INDICTMENT—BURGLARY.

An indictment for burglary may be laid according to the common law, and without referring to the facts upon which the imposition of the higher penalty depends, but in such case the punishment cannot exceed the less penalty.

2. SAME.

Where the facts are supposed to warrant it, and the higher penalty is contemplated, the crime must be described with the attending facts which justify the penalty.

3. WITNESS—CORROBORATION—ACCOMPLICE.

While, upon the trial of an indictment for burglary, the jury may convict the defendant on the uncorroborated testimony of an accomplice, they are not bound to do so, nor is it the rule, that as matter of law, they are bound to accept his testimony as true, when corroborated.

Appeal from a judgment convicting defendant of burglary.

McPeck & Jones and Lyman H. McCall, for appellant.

Horace S. Maynard, Pros. Atty., for the People.

MONTGOMERY, J.—The respondent was convicted of burglary, and brings the case here on exceptions. It is contended that the information fails to charge any offense known to the law. The charge, after fixing the time and place, is that the respondent, at about the hour of one o'clock in the night time, with force and arms, the dwelling house of Benjamin F. Rowson, there situate, feloniously did break and enter, with intent the goods and chattels of said Benjamin F. Rowson, in said dwelling house then and there being, feloniously to steal, take and carry away. No person then and there being, being put in fear, etc. How. Ann. St. § 9132, reads as follows: "Every person who shall break and enter any dwelling house in the night time, with intent to commit

the crime of murder, rape, robbery, or any other felony or larceny, or after having entered with such intent, shall break any such dwelling house in the night time, any person being lawfully therein, and the offender being armed with a dangerous weapon at the time of such breaking or entry, or so arming himself in such house, or making an actual assault on any person being lawfully therein, shall be punished by imprisonment in the state prison not more than twenty years." Section 9133 is as follows: "Every person who shall break and enter any dwelling house, in the night time, the offender not being armed or arming himself in such house with a dangerous weapon nor making any assault upon any person then being lawfully therein, with such intent as is mentioned in the preceding section, or who having entered with such intent, shall break such dwelling house, shall be imprisoned in the state prison for not more than fifteen years." The contention is that an information for burglary should so describe the offense as to bring it within one or the other of these sections, and that, if an attempt is made to bring it under the latter section, it is the duty of the prosecutor to aver that the accused was not armed, etc. The counsel for the people contend, on the other hand, that the statute creates no new offense, but provides for different degrees of punishment for burglary, the punishment being augmented if the offender is armed, etc., but if not armed, or if the offense is not so charged, the lesser penalty is to be inflicted, and the offense may still be charged as at the common law. Both parties rely upon *Harris v. People*, 44 Mich. 305; 6 N. W. 677. That case was one of an attempt to commit burglary, and the question involved was whether it was necessary to describe the attempted burglary as coming within one or the other of the above quoted sections. This was held unnecessary, and while we recognize that, as the charge was a charge of an attempt, the case is not necessarily controlling, the reasoning of the court, if followed, rules this case. Mr. Justice Graves, speaking for the court, said: "Burglary is a common-law offense, and not a crime ordained by legislation; and it is a single or identical offense, as it was originally. The statute does not carve it into two. It exposes it to

different grades of punishment, according as it may or may not be accompanied by incidents specified in the statute. It may be laid according to the common law, and without referring to the facts upon which the imposition of the higher penalty depends, but in such cases the punishment cannot exceed the lesser penalty. The accusation will support nothing more. Where the facts are supposed to warrant it, and the higher penalty is contemplated, the crime must be described with the attending facts which justify the penalty." It is true, this language is followed by the statement: "The various breakings resembling burglary which have been decided criminal by the legislature are distinguished from the ancient offenses of the common law. They owe their definition to the statute, and the statute must be consulted to ascertain their ingredients. When they are charged, they must be set forth in substance as in the statute, with the descriptive incidents, whether negative or otherwise." But the learned justice is here plainly referring to those breakings which are for the first time constituted offenses by statute, and which are not such at the common law. We think the reasoning of this case is sound, and it follows that a common-law information for burglary is still good. It is suggested that the information is not good as a common-law information, for the reason that at the common law burglary consisted of the breaking and entering of a dwelling house in the night time with intent to commit a felony, and that this information charges the intent to commit a larceny, which, it is said, may or may not be a felony. This objection is without force. Larceny is a common-law felony. See *Drennan v. People*, 10 Mich. 169.

The case of the people depended in a large part on the testimony of one Perkins, who was indicted with respondent, and, if his story is true, a participant in the crime. The circuit judge, in charging the jury, said: "Now, Mr. Perkins, who has taken the stand here, is known in the law as an accomplice, or, as it is sometimes said, he has turned state's evidence. Now, his testimony is governed by the same rules that govern the testimony of other witnesses, and its credibility is entirely for you. You

measure up his testimony, gentlemen, as you measure up the testimony of any other witness upon the stand. Has he told a reasonable story? Is it consistent? You also take into consideration his interest in the case, and his surroundings, and the situation in which he is placed, and from it determine whether he has told the truth about this matter or not. It follows just as naturally as anything can, if you believe him, Mr. Shaver should be convicted,—if you believe what he said here. On the other hand, if you do not believe a word he said; if you believe he has sworn to a lie in this case, and you do not believe the other testimony in the case that tends to convict Mr. Shaver; and, I think I can safely say, if you do not believe him,—Mr. Shaver ought to be acquitted. I don't think there is any error in that either. If you believe the testimony of Mr. Perkins in this case,—believe he has told the truth about this matter,—Mr. Shaver should be convicted. If you do not believe him, he should be acquitted. Now, you weigh up his testimony by the rules I have given you as to other witnesses, taking into consideration his surroundings, his interest, and all the other facts and surroundings that surround him; and, if you are satisfied of its truth, then you should believe his testimony." At the conclusion of the charge, and after an officer was sworn, the court said to the jury: "The prosecutor has called my attention to the fact that probably you may have been misled by what I said about the testimony of Mr. Perkins. I said to you that if you believe Mr. Perkins this man should be convicted (I do not recede from that), and that if you do not believe him he should be acquitted (and I do not recede from that); but, gentlemen, it is your duty, in determining whether Mr. Perkins has told the truth or not, to look the case all over,—the testimony of all the witnesses. Has he been corroborated? Has his testimony been corroborated by other witnesses, or by the surroundings in the case? If you believe it is, then you would believe him. If you do believe him, then you should take the course which I have suggested to you. In other words, I do not wish to be understood it all depended upon his testimony, because you weigh all the other testimony, and all

the surroundings in the case, to determine whether the story that he has told is a true story or not." We think this instruction open to the construction placed upon it by respondent's counsel, i. e. that, if the jury should find Perkins' testimony corroborated, then, under the charge, they were bound to accept his testimony as true. This would not by any means follow, as matter of law. Much would depend upon the extent of the corroboration, and whether the corroborative testimony was in itself credible. The fact that the witness himself was an offender against the law, and an alleged accomplice, bore upon his credibility; and, while the jury might convict respondent on his uncorroborated testimony, they were not bound to do so, nor is it the rule that, as matter of law, they are bound to accept his testimony as true, when corroborated. If such were the case, the testimony of two accomplices showing guilt would leave no room for escape. The damaging error in this instruction is the more apparent when it is considered that the defense offered testimony tending to prove an alibi. Exceptions will be sustained, and a new trial ordered. the other justices concurred.

NOTE ON "CORROBORATION."

ABDUCTION.—Under Pen. Code, § 241, declaring that no conviction can be had for abduction upon the testimony of the female abducted, unsupported by other evidence, the corroborating evidence need not, by itself, be sufficient to show guilt. *State v. Keith* (Minn.), 50 N. W. 691; 47 Minn. 559.

On a prosecution under Pen. Code, § 240, declaring any person guilty of abduction who "takes a female under the age of sixteen years for the purpose of * * * sexual intercourse," it is reversible error to refuse to instruct that a conviction cannot be had upon the testimony of the girl, unless her evidence is corroborated "upon every material point necessary to the perfection of the offense charged, to-wit, the taking away, and that the taking was for the purpose of sexual intercourse," since section 241 declares that no conviction can be had for abduction upon the testimony of the female abducted, unsupported by other evidence. *State v. Keith* (Minn.), 50 N. W. 691; 47 Minn. 559.

ACCESSORY.—Corroborating evidence held sufficient in this case. *People v. Dunn* (Sup. Ct., 1889), 25 St. Rep. 460; 53 Hun, 381.

ACCOMPLICE.—Comp. Laws Utah, § 5049, providing that a conviction cannot be had on the testimony of an accomplice unless corroborated by other evidence, does not require that the testimony of an accessory after the fact shall be corroborated, in order to sustain a conviction, since sections 4391 and 4949 make a clear distinction between an accomplice and an accessory after the fact. *People v. Chadwick* (Utah), 25 P. 737.

A conviction of larceny may rest on the uncorroborated evidence of an accomplice, when, considered with all the evidence, it satisfies the jury, beyond a reasonable doubt, of defendant's guilt. *Lamb v. State* (Neb.), 58 N. W. 963.

Conviction may rest on the uncorroborated evidence of an accomplice, if it satisfies the jury beyond a reasonable doubt. *Jenkins v. State* (Fla.), 12 So. 677.

The uncorroborated testimony of an accomplice is sufficient to sustain a verdict, and the degree of credit which ought to be given to his testimony is for the jury; but the judge, if requested, should advise the jury not to convict unless such testimony was corroborated by other evidence as to some material fact. *State v. Patterson*, 34 P. 784; 52 Kan. 335.

Although the uncorroborated testimony of an accomplice should be received with great caution, yet there is no rule of law forbidding a conviction upon his evidence alone. *Woods v. Commonwealth* (Va.), 11 S. E. 798; 86 Va. 929.

The rule that a conviction should not be had on the uncorroborated testimony of an accomplice applies when witnesses introduced by defendant confess themselves to be confederates in the crime. *United States v. Sykes* (D. C.), 58 F. 1000.

The evidence in corroboration of an accomplice need not extend to the whole of his testimony; but, it being shown that the accomplice has testified truly in some material particulars, the jury may infer that he has in others. *United States v. Lancaster*, 44 F. 896.

Where evidence is introduced to corroborate an accomplice's testimony (Code Crim. Proc., § 399), the truth of such evidence, and whether, if true, it tends to connect defendant with the crime, are for the jury. *People v. Bosworth* (Sup.), 19 N. Y. S. 114.

In misdemeanors, the testimony of accomplices is sufficient to

warrant a conviction. *Rountree v. State* (Ga.), 14 S. E. 712; 88 Ga. 457.

It is not necessary that the testimony of an accomplice in a conspiracy charged be corroborated in every part of the act which goes to make up the offense, but it is sufficient if he be corroborated in some material fact. *United States v. Howell* (D. C.), 56 F. 21.

It is not error to charge that the jury might convict defendant of burglary on the uncorroborated testimony of his accomplice if they believe it to be true, where the court also charges that such evidence, when not corroborated by some person not implicated, ought to be received with great caution, and the jury should be fully satisfied of its truth before convicting defendant thereon. *State v. Minor* (Mo. Sup.), 22 S. W. 1085.

Though an accomplice is a competent witness for the prosecution, his testimony should be received with caution unless corroborated by unimpeachable evidence as to some material points. *United States v. Ybanez* (C. C.), 53 F. 536.

Testimony introduced to corroborate a witness who is a confessed accomplice in the crime, which does not tend to connect defendant therewith, is immaterial, and it is error to refuse an instruction to that effect. *Conway v. State* (Tex. Cr. App.), 26 S. W. 401.

On a criminal prosecution the court charged that a state's witness was an accomplice under his own testimony, that a person cannot be convicted on an accomplice's testimony unless corroborated by other evidence connecting defendant with the offense, and that the corroboration is insufficient if it merely shows the commission of the offense, "or circumstances thereof." Held, that the omission of "the" before "circumstances" does not imply that less than all the circumstances would be sufficient corroboration, and that the instruction is unobjectionable. *State v. Russell* (Iowa), 58 N. W. 890.

A defendant who has testified for the state cannot be corroborated by proof of declarations made after promises of immunity had been made, or after the hope of obtaining a light punishment by becoming a witness had sprung into his mind. *Conway v. State* (Tex. Cr. App.), 26 S. W. 401.

On a criminal trial the court charged "that the jury might convict on the unsupported testimony of an accomplice, but that it was dangerous and unsafe to do so; but if the story of the accomplice, taken with the other facts and circumstances in the case, carry conviction to the minds of the jury, then it is their duty to

convict. The jury must be satisfied, beyond a reasonable doubt, of the guilt of the defendant, before they can convict.* Held not objectionable as tending to mislead the jury as to the weight to be given to an accomplice's testimony. *State v. Barber* (N. C.), 18 S. E. 515; 113 N. C. 711.

It is proper to refuse a charge that, if a witness' testimony shows him to be an accomplice, the jury should not convict, unless his testimony is corroborated by testimony that they believe to be true, beyond a reasonable doubt. *Vaughan v. State* (Ark.), 24 S. W. 885; 58 Ark. 353.

A charge that defendant cannot be convicted on accomplice testimony, unless corroborated by other evidence tending to connect defendant with the crime, and not merely showing the fact and circumstances thereof, follows the statute (Mansf. Dig., § 2259), and is good law. *Vaughan v. State*, 24 S. W. 885; 58 Ark. 353.

Where the only direct evidence against defendants was that of an alleged accomplice, and the only corroborative evidence that of his wife, it was error to refuse to charge that, if the jury found the direct witness to be an accomplice, and did not believe the evidence of his wife, then there was no corroborating evidence of the accomplice, and it was their duty to acquit. *People v. Strybe* (Cal.), 36 P. 3.

An instruction that the testimony of an accomplice is admissible, yet, when uncorroborated by some person, not implicated in the crime, as to matters connecting defendant with its commission, ought to be received by the jury with great caution, and they ought to be fully satisfied of its truth before convicting defendant on such testimony, but they are at liberty to convict on the uncorroborated testimony of an accomplice, if they believe his statements, and that the facts sworn to by him establish defendant's guilt, fairly presents the law. *State v. Crab* (Mo. Sup.), 26 S. W. 548.

Section 399, Code Crim. Pro., is complied with if there is some other evidence fairly tending to connect defendant with the commission of the crime, so that his conviction will not rest entirely on the evidence of the accomplice. *People v. Everhardt* (Ct. App., 1887), 5 St. Rep. 793; 104 N. Y. 591; aff'g 4 St. Rep. 518; *People v. Elliott* (Ct. App., 1887), 8 St. Rep. 703; 106 N. Y. 288; rev'g 8 St. Rep. 223; *People v. Sanborn* (Sup. Ct., 1888), 14 St. Rep. 123.

In Missouri, a conviction can be had on the uncorroborated testimony of an accomplice alone, where the jury, after being duly

cautioned by the court, is fully satisfied that his testimony is true. *State v. Jackson* (Mo. Sup.), 17 S. W. 301; 106 Mo. 174.

Where the evidence showed that the three witness on whose testimony defendant's conviction mainly rested were accomplices if the offense was committed, the court erred in refusing to charge that, if either or all the witnesses were accomplices, defendant could not be convicted on the testimony of the accomplice unless it was corroborated by other evidence; and that the testimony of one accomplice was not corroborative of that of another. *Whitlow v. State* (Tex. App.), 18 S. W. 865.

Where three persons who are jointly charged with the conspiracy make disclosures with referenc^e thereto,—one makes a voluntary confession, another is permitted to become a witness for the government, under an implied promise of pardon, and testifies, and the other makes a declaration during the pendency of the criminal enterprise,—and there have been no collusion or knowledge inter sese with reference to the several statements, the fact that the three statements are, in all material respects, identical, is confirmatory of the testimony as that of accomplices, and of the credit of a witness who testifies to the declaration. *United States v. Lancaster*, 44 F. 896.

ADULTERY.—On trial for adultery, alleged to have been committed with the daughter of defendant without her consent, the court instructed the jury that, if they found beyond a reasonable doubt that defendant had committed the act charged, the relationship and unwillingness of the woman were immaterial, except on the question of the corroboration of her testimony; that no conviction could be had on the testimony of an accomplice unless corroborated, and such corroboration is not sufficient if it merely shows the commission of the alleged offense or the circumstances. The court then defined an "accomplice," and added that, if the jury found that the woman was his accomplice, then they could not convict defendant on her testimony, unless corroborated as before charged; that the jury could consider as corroborating evidence the testimony given by other parties showing indecent familiarities on the part of defendant, provided they believed such conduct showed an adulterous disposition or desire on his part towards the woman. Held, that such charges were properly given. *State v. Henderson* (Iowa), 50 N. W. 758.

On trial for adultery, alleged to have been committed with the daughter of defendant without her consent, it is proper to refuse to charge that a conviction cannot be had on the testimony of the woman unless corroborated "by such other evidence as shall tend to connect defendant with the commission of the offense, and the corroboration will not be sufficient if it merely shows the commission of the offense or circumstances thereof." *State v. Henderson* (Iowa), 50 N. W. 758.

ARSON.—On trial for arson a witness testified that she set fire to the house after she and defendant had saturated the floors with kerosene, and that she did so at the request of defendant. Held, that such testimony was corroborated by evidence that defendant frequently visited the house of such witness before the fire; that he told her she "had better send the thing up in a balloon;" that shortly before the fire she sent out for oil, and took it into the house where defendant was; and that he assisted her to procure money with which to procure insurance on the property burned. *Herrick, J., dissenting. People v. Christian* (Sup.), 29 N. Y. S. 271; 78 Hun, 28.

BASTARDY.—A conviction of bastardy may be had on the uncorroborated testimony of the prosecutrix. *Robb v. Hewitt* (Neb.), 58 N. W. 88.

BURGLARY.—Where defendant was guilty of burglary beyond doubt, if an accomplice's testimony was true, and witness' story is corroborated by evidence aliunde: (1) By proof of the corpus delicti; (2) that defendant was with witness about the time the crime was committed, after twelve o'clock that night; (3) that some one wearing gum boots made tracks near the window entered, and that defendant wore gum boots on that night; and (4) that witness on the next morning after the burglary gave the same account of the transaction that he gave at the trial,—it cannot be said that there was no evidence justifying the jury in giving credence to the accomplice's testimony, and convicting defendant. *State v. Jackson* (Mo. Sup.), 17 S. W. 301; 106 Mo. 174.

On a trial for burglary, after proof of the corpus delicti, the testimony of an accomplice is sufficiently corroborated to authorize a conviction by other evidence that two days after the burglary accused was in possession of goods which were in the house

when the burglary was committed, and the possession of which was not satisfactorily explained. *Boswell v. State* (Ga.), 17 S. E. 805.

On a trial for burglary, proof that the door of the house entered was usually kept locked, together with the fact that goods stored in the house disappeared, and were shortly afterward found, some in the possession of accused, and some in possession of a witness for the state against him, is sufficient to corroborate the testimony of the witness that the building was broken into by himself and accused in the night by unlocking the door, and that they stole the goods. *Pritchett v. State* (Ga.), 18 S. E. 350.

On a prosecution for breaking into a car with intent to steal, testimony of an accomplice that defendant committed the crime charged is sufficiently corroborated by evidence that they were seen together in the vicinity of the car about the time when the offense was committed, and that they were afterwards together, selling knives, such as were alleged to have been stolen, at less than their value. *State v. Russell* (Iowa), 58 N. W. 890.

On a trial for burglary, evidence by the confessed burglar that defendant participated in the crime does not warrant a conviction, where the only corroborating evidence is that defendant stated to the officers searching his house that the burglar had nothing therein, when in fact the latter had some of the stolen goods there. *Buchanan v. State* (Tex. Cr. App.), 24 S. W. 895.

In a prosecution for killing a cow, an accomplice's testimony is not corroborated, as to defendant's connection with the crime, by his having guided officers to the place near defendant's house where the hide and brands were hidden; and, though there be other really corroborative evidence, yet defendant having on oath denied knowledge or participation, and other witnesses having sworn to his alibi, and to the absence of meat from his house at the time, the court's instruction that such evidence is strong corroboration is cause for reversal. *McNealley v. State* (Wyo.), 36 P. 824.

CONFESSION.—A confession by accused, supported by clear evidence of the corpus delicti, sufficiently corroborates the evidence of an accomplice. *Schaefer v. State* (Ga.), 18 S. E. 552.

The confession of defendant, corroborated by proof, that the offense had been committed, is sufficient to authorize a conviction. *Mullins v. Commonwealth* (Ky.), 20 S. W. 1035.

A conviction of arson was warranted where, in addition to defendant's confession that he had been "given away," there was direct evidence of the burning, and circumstantial evidence from which the jury could rightly infer that the fire was not accidental, but felonious, the corpus delicti being thus established independently of the confession. *Westbrook v. State* (Ga.), 16 S. E. 100.

On a trial for poisoning cattle, a detective testified that defendant confessed to him that he had poisoned the cattle with Paris green, and it appeared that in consummation of a plan of revenge, suggested by defendant, for the alleged ill treatment of the detective by complainant, he purchased more of the poison, and went at night with the detective and placed it in reach of complainant's cattle. Defendant denied that he confessed having poisoned the cattle prior to that time. Held, that the mode of revenge suggested by defendant, and the kind of poison to be used, were corroborative evidence of the truth of the confession. *Osborn v. Commonwealth* (Ky.), 20 S. W. 223.

DIVORCE.—In action for divorce, paramour is corroborated by defendant's refusal to deny testimony, or by proof of lewd disposition. *Steffens v. Steffens* (N. Y. C. P. 1890), 33 St. Rep. 643.

FORGERY.—On trial of indictment for forgery, corroboration of accomplice is not afforded by his testimony as to other forged notes. *People v. White* (Sup. Ct., 3 D., 1891), 41 St. Rep. 832; 62 Hun, 114.

Defendant was indicted for aiding and abetting V. in committing a forgery of a note. There was no direct testimony against defendant, except that of V., who had been convicted of the forgery in question, and who testified that defendant had advised and abetted him in the forgery. V. also testified that he had sold certain forged notes to defendant, not connected with the one in question, and there was testimony showing, or tending to show, that defendant was aware of their fraudulent character. Held, that the court erred in admitting such other notes in evidence, and that circumstances tending to corroborate V.'s testimony with respect to such other notes did not corroborate his statements with respect to the forgery of the note for which defendant was indicted. Code Crim. Proc., § 399, provides that "a conviction cannot be had upon the testimony of an accomplice unless he be corroborated by such other evidence as tends

to connect the defendant with the commission of the crime." *People v. White* (Sup.), 16 N. Y. S. 571; 62 Hun, 114.

INCEST.—Granting that the female was an accomplice in the commission of the crime of incest, she is sufficiently corroborated by the fact that, as soon as the child was born, defendant separated from his wife and family on account of that fact, and that, when sought by his wife's relatives for the purpose of demanding an explanation of his conduct, he admitted his guilt. *Schoenfeldt v. State* (Tex. App.), 18 S. W. 640.

A female who knowingly, voluntarily, and with the same intent as actuates the male, commits the crime of incest with him, is equally guilty of and an accomplice in the crime, and his conviction on her uncorroborated testimony is unwarranted. *Blanchett v. State* (Tex.), 14 S. W. 392.

INTOXICATION.—Corroboration. Testimony of witness, so intoxicated at time of occurrence of alleged offense as to render his statement confused, must be strongly corroborated, to justify conviction. *People v. O'Neill* (Sup. Ct.), 21 St. Rep. 274.

What not sufficient corroboration. *Id.*

LOTTERY.—Purchaser of lottery tickets is not accomplice of seller, so as to require corroboration of his testimony. *People v. Emerson* (Sup. Ct., 1888), 20 St. Rep. 15.

MURDER.—Evidence in a murder case that a coat belonging to deceased was found in defendant's possession is proper corroborative evidence, though the accomplice testified only as to the killing, and not as to the taking of the coat. *Malachi v. State* (Ala.), 8 So. 104; 89 Ala. 134.

Though the coat was not found in defendant's possession until three months after the homicide, it was properly left to the jury to decide whether it was sufficient to corroborate the testimony of the accomplice. *Malachi v. State* (Ala.), 8 So. 104; 89 Ala. 134.

Under Pen. Code, section 1111, providing that a conviction cannot be had on the testimony of an accomplice unless he is corroborated by other evidence, which of itself tends to connect defendant with the offense, and that the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof, a conviction of murder cannot be sustained,

where there is no evidence aside from that of the accomplice on which even a well-grounded suspicion of defendant's guilt can be founded. *People v. Smith* (Cal.), 33 P. 58.

RAPE.—No denial, when charged with crime, is sufficient corroboration to satisfy requirements of the statute. *People v. Morris* (Sup. Ct. 1890), 35 St. Rep. 942.

On an indictment for rape on a girl under the age of sixteen years, she and her stepfather testified that, after she had disclosed to him the commission of the offense, he took her to the residence of defendant, and, the latter's wife being present, the stepfather accused him of the crime, the girl narrating the circumstances; and that defendant was greatly agitated, and made no denial, but, when importuned by his wife to say if he had done so, nodded his head affirmatively. Held that, even though the stepfather was entitled to but little credit as a witness, there was sufficient corroboration to sustain a conviction under Penal Code N. Y. § 283, providing that no conviction can be had in such a case upon the testimony of the female so defiled, unsupported by other evidence. *People v. Morris*, 12 N. Y. S. 492; 58 Hun, 609.

On an indictment for attempt to commit rape, the testimony of the complainant to the act of defendant was corroborated by evidence of her bruised appearance, caused, as she testified, by his striking her in the face when she resisted him; and also by testimony of the bar-keeper of the drinking-saloon, in a room of which they were at the time, as to the attitude of the parties and other circumstances. Defendant's testimony was wholly improbable. Held, that the testimony was sufficiently supported to sustain a conviction, under Penal Code N. Y. § 283, providing that no conviction can be had in such a case upon the testimony of the female unsupported by other evidence. *People v. O'Connell*, 12 N. Y. S. 477; 58 Hun, 609.

On a trial for rape prosecutrix testified that the assault was made in the seed-house; that she called for her younger sister; that she came; that defendant sent her back, and then renewed the assault. The younger sister testified that she heard a cry and thought it was her brother at the barn; that she started to go there; that defendant stepped out of the seed-house, and sent her back; that it was small, and there was no room to play in it; that he had at other times sent her away. Held that, taking into consideration the fact of defendant's stepping outside when the

child was not coming there, and the inference that the other times he sent her away were when she went there to play, there was corroborative evidence tending to connect him with the offense. *State v. Watson* (Iowa), 46 N. W. 868.

Testimony that defendant and prosecutrix were seen walking together along a railroad track is not sufficient corroboration in prosecution for assault to commit rape. *State v. Chapman* (Iowa), 53 N. W. 489.

To establish the crime "of an attempt to commit rape," it is not essential that the testimony of the female on whom the alleged attempt was made be corroborated by other evidence. *People v. Kirwan* (Sup.), 22 N. Y. S. 160; 67 Hun, 652.

A charge of rape, made months after the alleged commission of the same, where there were no marks of violence on the person or clothing of the prosecutrix, or evidence of excitement, cannot be sustained, unless there is very strong corroborating proof of the commission of the offense. *Richards v. State* (Neb.), 53 N. W. 1027.

A conviction of rape may be had on the uncorroborated testimony of prosecutrix. *State v. Dusenberry*, 20 S. W. 461; 112 Mo. 277.

A father may be convicted of the rape of his daughter under fourteen years of age, on the uncorroborated testimony of the daughter, where the reason given for the failure to immediately disclose the wrong was that of fear of the father. *State v. Patrick*, 17 S. W. 666; 107 Mo. 147, distinguished, *State v. Wilcox* (Mo. Sup.), 20 S. W. 314; 111 Mo. 569.

Where, on a trial for rape, it is in evidence that prosecutrix, a girl fifteen years old, told her mother soon after the occurrence, it is not error for the court to instruct the jury that such fact is a corroborating circumstance tending to sustain the truth of her statements. *Territory v. Edie* (N. M.), 30 P. 851.

On a trial for rape, where defendant testified that the complaining witness consented to the sexual intercourse with him, there was no error in charging the jury that if it believed from the evidence of any witness, except that of the prosecutrix, that at or about the time, and at or near the place, stated by her, defendant carnally knew the prosecutrix, it had the right to consider that fact in corroboration of her testimony. *State v. Sigg* (Iowa), 53 N. W. 261.

On a trial for rape it appeared that prosecutrix had gone with defendant in his carriage to his house, and the rape was alleged to have been committed in the woods along the road. *Wheel*

tracks were found in the woods, and defendant's sister-in-law testified that when prosecutrix arrived at defendant's house she was very dejected, and wiped her eyes occasionally, as if she were weeping. Prosecutrix testified that a button had been torn from her clothes, and, on search in the woods at the place specified, a button was found. A physician testified that he examined prosecutrix soon after the time of the alleged rape, and found that the hymen had recently been ruptured. Held, sufficient corroboration of prosecutrix. Pen. Code, § 283. Mayham, P. J., dissenting. *People v. Terwilliger*, 26 N. Y. S. 674; 74 Hun, 310; *id.* (N. Y. App.), 37 N. E. 565.

The uncorroborated testimony of the prosecutrix is not sufficient to sustain a conviction of rape, where her testimony is somewhat improbable, and is impeached in some particulars by her own previous inconsistent statements, and in other particulars by the testimony of other witnesses. *State v. Connelly* (Minn.), 59 N. W. 479.

A conviction of rape on the uncorroborated testimony of the prosecutrix will be reversed. *People v. Kunz* (Sup.), 27 N. Y. S. 945.

In a prosecution for rape it is not essential that the prosecutrix be corroborated by other witnesses as to the particular acts which constitute the offense. *Fager v. State*, 35 N. W. 195; 22 Neb. 332, followed, *Hammond v. State* (Neb.), 58 N. W. 92.

What is sufficient corroboration of testimony of complainant on trial of indictment for rape. *People v. McKeon* (Sup. Ct., 5 D., 1892), 46 St. Rep. 69; 64 Hun, 504.

Conviction of rape, on uncorroborated testimony of complainant, will be reversed. *People v. Kunz* (Sup. Ct., 2 D., 1894), 58 St. Rep. 740.

It is not necessary that prosecutrix should be corroborated upon all material points of her testimony. *People v. Terwilliger* (Sup. Ct., 3 D., 1893), 56 St. Rep. 255; 74 Hun, 310; *aff'd*, 60 St. Rep. 866.

What facts supporting or corroborating evidence should fairly tending to prove. *Id.*

Disclosure within proper time is some corroboration. *Id.*

Corroborating evidence need not be such as to exclude every hypothesis except that of guilt. *Id.*

Consent of female need not be corroborated. *Id.*

That defendant had opportunity at least to commit offense charged, is corroborative evidence. *Id.*

Testimony of complainant held sufficiently corroborated to sustain conviction for attempt to commit rape. *People v. O'Connell* (Sup. Ct., 1890), 35 St. Rep. 940.

ROBBERY.—Under Crim. Code Ky., § 241, providing that there cannot be a conviction on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, there cannot be a conviction of robbery where the only testimony offered for the purpose of corroboration was that about the time thereof defendant was seen going towards the store of the person robbed, a place which all these parties, as well as others, often visited. *Smith v. Commonwealth* (Ky.), 17 S. W. 182.

Where the only evidence to convict defendant of a robbery is that of an accomplice, who testifies that defendant planned the robbery, and received part of the proceeds, and that of two witnesses, that they had seen defendant and the accomplice together on two occasions before the robbery, there is no such corroboration of the evidence of the accomplice, as required by Pen. Code, § 1111, as to justify conviction. *People v. Larsen* (Cal.), 34 P. 514.

In a prosecution for the theft of cattle the testimony relied on by the state was that of an accomplice, who was uncorroborated, unless by the testimony of his father, who testified that he had a conversation with defendant in regard to certain prosecutions pending against him, but without particular reference to the case on trial, in which defendant asked if he could not compromise with him, and suggested that witness' son, the accomplice, be put on a horse and run out of the country, and that, if witness did not adopt such suggestion, there would be serious trouble. Held insufficient to corroborate the testimony of the accomplice. *Clark v. State* (Tex. App.), 17 S. W. 1089.

On a trial for the theft of a horse, where the main testimony against the defendant was that of an acknowledged accomplice and of H., and there was evidence that H. was an accomplice, and the court charged that conviction could not be had on said accomplice's testimony alone, failure to charge that one accomplice could not corroborate another was error. *McConnell v. State* (Tex. App.), 18 S. W. 645.

On a trial for larceny of a horse, a boy testified that defendant sent for him and advised him to steal the horse, and drew on an envelope a map showing what route he should take to reach the

stable. The witness also stated that he took the horse, and was met by defendant, who put a bridle on it, and helped witness to mount. The alleged messenger from defendant to the boy stated that she delivered the message to the boy, and that he went away that evening after supper. There was also evidence that a map like the one described by the boy was found in his bedroom; that certain words on it were in defendant's handwriting; that the boy was seen at defendant's house on the evening testified to by him, and that the tracks of a man and a boy, together with the horse's tracks, were found at the place where the boy said defendant met him and put a bridle on the horse. Held, that the boy's testimony was sufficiently corroborated to justify a conviction. *People v. Willet*, 20 N. Y. S. 445; 65 Hun, 624.

Testimony of a woman that she gave to defendant, who was charged with being her accomplice, money, which she admitted having stolen from one G., and that defendant had advised her to "work" some money out of G., is not corroborated by evidence that, when the woman was arrested for the larceny, defendant asked to see her, told the sheriff that he had arrested the wrong woman, and told the under-sheriff that he did not know her. *People v. Koenig*, 34 P. 238; 99 Cal. 574.

On a trial for cattle theft, defendant's accomplice testified that they killed the animal. A witness testified that, on the day the animal was killed, defendant and his accomplice sold witness' mother some beef. Another witness testified that he saw them in the pasture where the animal was killed. Another witness testified that on the day of the theft he saw them in defendant's field, that the wagon was in the field, and that the wagon tracks ran from the field to within ten feet of where the animal was killed. Held sufficient corroboration of the accomplice's testimony, and to sustain a conviction. *Morrow v. State* (Tex. Cr. App.), 26 S. W. 395.

SEDUCTION.—Tex. Stat. Code Crim. Proc., tit. 8, chap. 7, art. 730, exception 3, repealed, and, in prosecutions for seduction, the prosecuting witness allowed to testify, but conviction not allowed upon her uncorroborated testimony. Gen. Laws, 1891, chap. 33, p. 34.

Under Laws N. C., 1885, chap. 248, making it an offense to seduce an "innocent and virtuous" woman under promise of marriage, and providing "that the unsupported testimony of the woman shall not be sufficient to convict," the additional evidence required must be confined to the act of sexual intercourse, but

must extend to its inducement by a promise of marriage. *State v. Ferguson* (N. C.), 12 S. E. 574; 107 N. C. 841.

Code Ala., 1886, section 4015, relating to the crime of seduction by means of a promise of marriage, provides that, "no conviction shall be had under this section on the uncorroborated testimony of the woman upon whom the seduction is charged." On an indictment for this offense the sister of the prosecutrix testified that the prosecutrix got a dress ready for her marriage. Held, that this is not such corroboration as is required, for it is hearsay, and does not tend to connect defendant with the offense charged. *Cooper v. State* (Ala.), 8 So. 821; 90 Ala. 641.

Rev. St. Mo., 1879, § 1912, provides that, in trials for seduction under promise of marriage, the evidence of the woman as to such promise must be corroborated. Held, that, though evidence of circumstances which usually accompany the engagement are sufficient supporting evidence, the existence of such circumstance must be shown by other testimony than that of the woman herself. *State v. McCaskey* (Mo.), 16 S. W. 511.

Code, section 4560, provides that, in a prosecution for seducing an unmarried woman of previously chaste character, the defendant cannot be convicted on the testimony of the person injured, unless she be corroborated by other evidence tending to connect defendant with the offense. Held, on a trial for seduction, that it was error for the court to charge that the prosecutrix was sufficiently corroborated "if defendant, on being informed by her that she was pregnant, advised her to procure an abortion," where it appeared that the prosecutrix was the only witness who testified to such fact. *State v. Enke* (Iowa), 51 N. W. 1146.

Although a person can not be convicted of seduction on the uncorroborated testimony of the woman, proof other than her own testimony that he was her suitor, while by no means conclusive, tends to make credible her testimony against him. *State v. Curran*, 49 N. W. 1006; 51 Iowa, 112.

The court instructed: "And testimony which tends to connect defendant with the act of illicit intercourse, if any, is not sufficient corroboration, nor is mere proof of opportunity to have sexual intercourse sufficient corroboration." Held, that the instruction was not misleading or prejudicial, as admitting the facts of opportunity for sexual intercourse. *State v. Gnagy* (Iowa), 50 N. W. 882.

Under Code, section 4560, providing that defendant in a prosecution for seduction cannot be convicted upon the testimony of prosecutrix unless she be corroborated by other evidence tending

to connect the defendant with the commission of the offense, direct corroborative evidence of the seductive arts or promises to obtain intercourse is not required, nor need the corroboration necessarily be as to all the elements of the offense; and where the testimony of the prosecutrix shows the offense, and to connect defendant therewith she is corroborated by witnesses showing intimacy and courtship between the parties, as well as actual intercourse, the case is for the jury, and it is error to direct a verdict for defendant. *State v. Smith* (Iowa), 51 N. W. 24.

On a trial for seduction under a promise of marriage, the court instructed that a promise of marriage could not be found from the evidence of the prosecutrix alone, but that it must be corroborated either by other direct evidence, or by admissions of defendant, or by circumstances as usually attend an engagement of marriage; but, where such circumstances are relied on as corroboration, proof of attention is not sufficient unless from its duration, and from the conduct of the parties, it reasonably carries conviction that an engagement of marriage exists; and the corroboration of the prosecuting witness must be something more than sufficient to overcome the oath of defendant and the legal presumption of innocence. Held, that this clearly informed the jury as to the amount of evidence required for such corroboration. *State v. Wheeler* (Mo. Sup.), 18 S. W. 924.

Corroborative evidence in proof of seduction need not be direct and positive, or such evidence as is sufficient to convict independent of that of the prosecutrix, but simply such circumstances as tend to support her testimony, and to satisfy the jury she is worthy of credit. *Wright v. State* (Tex. Cr. App.), 20 S. W. 756; 31 Tex. Crim. R. 354.

Rev. Stat., 1881, § 1807, provides that in prosecutions for seduction "the evidence of the female must be corroborated to the extent required as to the principal witness in cases of perjury." Held, that where the only corroborating evidence was that defendant stated to a witness that the female "was a good girl, and he expected to make her" his wife, it was insufficient to sustain a conviction, assuming that it tended to corroborate the testimony of the female that her seduction was accomplished under promise of marriage. *La Rosae v. State*, 31 N. E. 798; 132 Ind. 219.

On a trial for seduction the prosecutrix was sufficiently corroborated where there was testimony by several witnesses that the parties kept company, and acted as lovers usually do, and that

defendant had said that they were to be married. *State v. Bal-doser* (Iowa), 55 N. W. 97.

To warrant a conviction of seduction under promise of marriage there must be corroboration of the woman's testimony as to the promise of marriage, and the fact of intercourse. *Ferguson v. State* (Miss.), 15 So. 66.

What evidence sufficient under section 286, Penal Code, to support testimony of the female seduced. *People v. Kearney* (Sup. Ct., 1888), 13 St. Rep. 246; 47 Hun, 129; rev'd, 17 St. Rep. 165.

Evidence held admissible to refute corroboration of prosecutrix. *People v. Flaherty* (Sup. Ct., 5 D., 1894), 61 St. Rep. 197; 79 Hun, 48.

In prosecution for seduction where prosecutrix testifies that immediately after promise of marriage and on faith of it intercourse took place and continued frequently thereafter, evidence that she was delivered of a child thirteen months after such promise and seduction does not support her evidence and is immaterial. *People v. Kearney* (Ct. App., 1888), 17 St. Rep. 165; 110 N. Y. 188.

Supreme Court of Michigan.

Filed December 24, 1895.

PEOPLE v. O'NEILL.

1. INDICTMENT—DEMURRER.

On overruling a demurrer to a plea in abatement on an indictment, the state may rely on the merits.

2. DISTRICT ATTORNEY—ASSISTANT.

The fact that an attorney is prejudiced against a liquor traffic does not disqualify him from assisting in prosecutions for violations of the liquor law.

3. SAME.

Sections 551, 560 of 3 How. Ann. St. do not prohibit the employment of additional counsel in preparing and presenting cases, involving misdemeanor to the grand jury, when, in the judgment of the board of supervisors, prosecuting attorney and the court, such additional counsel is necessary.

4. JUROR—DISQUALIFICATION.

A juror, whose opinion is based upon hearsay and is not fixed and positive, is competent where he swears that he can render a fair and impartial verdict.

5. SAME.

But a juror, who testifies that, if he found the testimony about equally balanced, he would render a verdict of guilty, is incompetent.

6. EVIDENCE—NOTICE—PRODUCE.

Where no notice to produce is given, parol evidence of the contents of bills of goods is inadmissible.

7. APPEAL—HARMLESS.

The case will not be reversed for error in allowing an improper question to be answered, where such answer is unimportant and does no harm.

8. EVIDENCE—REFRESHING MEMORY.

It is competent, in case of unwilling witnesses, for the prosecution to call the attention of such witnesses to their depositions given on other occasions, for the purpose of refreshing their memories, and, if possible, eliciting the truth; but this cannot be done for the purpose of impeachment.

9. SAME.

A witness may be compelled to disclose the evidence he gave before the grand jury.

10. TRIAL—REMARKS OF COUNSEL.

Remarks of the prosecuting attorney outside of the legitimate argument, are subjects of just criticisms.

Appeal from a judgment convicting defendant of a violation of the local option law.

T. E. Tarsney and W. W. Wicker, for appellant.

Horace S. Maynard, Pros. Atty., for the People.

GRANT, J.—1. The respondent was convicted of a violation of the local option law, in force in Eaton county, upon an indictment presented against him by the grand jury. After a motion to quash was denied, the respondent interposed three pleas in abatement, setting forth that the circuit court had no authority to make an order for the appointment of an assistant prosecuting attorney, that said assistant prosecuting attorney unlawfully

counseled and advised the grand jury, that said assistant prosecuting attorney had no authority to act, and that he had been employed by private parties to assist in the prosecution of violators of this law. To this plea the prosecutor demurred. The demurrer was overruled, and the prosecutor permitted to file replications to the pleas. To these replications the respondent demurred, upon the ground that the former order overruling the demurrer was final, that its effect was to quash the indictment, and that he should be discharged. This demurrer was overruled, and a jury tendered to the respondent to try and determine the questions of fact set up in the plea. This the respondent refused, whereupon the plea in abatement was overruled, a plea of not guilty entered, and a trial had. Formerly in England, even in cases of felony, when the demurrer to an indictment was overruled, the prisoner was not allowed to plead over, upon the theory that his demurrer admitted his guilt. Such, however, has not been the rule in this country, except, perhaps, in some cases of misdemeanor. Such a rule finds no commendation in reason. The purpose of a demurrer is to obtain the judgment of the court upon the law, and to determine whether the pleading on its face establishes a case. Of course, if the party stands by his demurrer, judgment must go against him. But the usual and proper practice is, where the demurrer is overruled, to permit the proper pleading to be filed to join issue. The respondent's counsel cite *Douglass v. Satterlee*, 11 Johns. 16. The practice permitted in that case is against the learned counsel's contention. Upon overruling the demurrer to the plea, it was held that the defendant was entitled to judgment, but with liberty to the plaintiff to withdraw his demurrer and reply. The universal rule in this country, when a demurrer to an indictment or information has been overruled, is to permit the respondent to plead over. The court in such case has determined that the indictment is good, and allows the respondent to plead to the merits. There is no good reason why the same ruling should not apply in behalf of the people to a plea in abatement, and such is the rule. *State v. Barrett*, 54 Ind. 434; *State v. Nelson*, 7 Ala. 610.

2. The board of supervisors authorized the employment of an assistant prosecuting attorney to assist the prosecutor in preparing and investigating cases before the grand jury. Acting under this resolution, the prosecutor applied to the court, asking the appointment of Mr. McPeek, and an order was entered making the appointment. The statutes (sections 551, 560) prescribing the duties of the prosecuting attorney, and authorizing the employment of additional counsel in cases of felony, do not prohibit the employment of additional counsel when, in the judgment of the board of supervisors, the prosecuting attorney, and the court, such additional counsel is necessary.

3. Objection was made to the employment of Mr. McPeek to assist in trying this cause, because of his strong prejudices against the liquor traffic. Before the court made the order, Mr. McPeek was examined under oath, and testified that he had a very strong prejudice against the sale of intoxicants as a beverage. This did not disqualify him. The public authorities were not required to employ an attorney who believed in the liquor traffic, or was indifferent to the illegal sales of liquor. The traffic in Eaton county was made illegal by the vote of the people. The stronger one's convictions are against an illegal traffic, the more efficient prosecutor he is likely to make, and to such a prosecutor the people are entitled.

4. Objection was made to the competency of several jurors on the ground that they had formed opinions. Their opinions were based upon hearsay, were not fixed or positive, and the jurors swore that, notwithstanding such previously-formed impression or opinion, they could render a fair and impartial verdict. They were competent jurors.

5. One juror was incompetent. He had been a clergyman and was then a farmer. When asked what his verdict would be, if he found the testimony about equally balanced between the people and the respondent, he replied, "I should think it would be guilty."

6. A witness who had drawn some cases of goods to the respondent's place, billed as "hop pop," testified that he delivered

the bills to the respondent, and was asked, "Where was the hop pop billed from?" The testimony was incompetent, and the question should have been excluded. The bills were the best evidence, and no notice was given to produce them. We decide this point in view of a new trial. The answer was unimportant, did no harm, and the case would not be reversed for this error.

7. Some witnesses for the prosecution were asked by the prosecutor about their testimony before the grand jury. It is apparent upon the record that these were unwilling witnesses for the prosecution, who were evidently prejudiced against it. It is competent, in such cases, for the prosecution to call the attention of witnesses to their depositions given on other occasions, for the purpose of refreshing their memories, and, if possible, eliciting the truth. This cannot be done for the purpose of impeachment. A party, however, is entitled to some latitude in the examination of hostile witnesses. It is, however, insisted that the witness could not disclose the evidence he gave before the grand jury. The decisions are not uniform upon the question how far evidence given before the grand jury may be disclosed in judicial proceedings. The decisions appear to be, to some extent at least, determined upon the statutes of the various states. In *State v. Knight*, 43 Me. 1, it appears to have been conceded upon the trial that such testimony was not admissible. In *Tindle v. Nichols*, 20 Mo. 326, plaintiffs were husband and wife, and brought their action against defendant for slander of the wife. The defendant justified by alleging the truth of the words spoken, and that she, as a witness before the grand jury, swore falsely. The defendant, in order to prove his answer, called some of the grand jurors as witnesses to state what the wife had testified to before the grand jury. This was held incompetent under the statute of Missouri, which is the same as that in this state. How. Ann. St., § 9502, reads as follows: "Members of the grand jury may be required by any court to testify, whether the testimony of a witness examined before such jury is consistent with, or different from, the evidence given by such witness before such court; and they may also be required to disclose the testimony given before them by any person, upon complaint against such person for perjury, or

upon his trial for such offense," etc. The present case is completely covered by this statute. Members of the grand jury can testify, in a proper case, to statements of witnesses made before them. The respondent could have introduced their testimony to contradict the testimony of the people's witnesses. *State v. Fasset*, 16 Conn. 467; *State v. Broughton*, 7 Ired. 96; *Way v. Butterworth*, 106 Mass. 75; 3 *Rice, Ev.*, § 255.

8. Complaint is made that some of the remarks of the assistant prosecuting attorney in his closing argument to the jury were intemperate, and an unjustifiable appeal to prejudice. It is unnecessary to state them in this opinion. In view of a new trial, we deem it proper to say that we think they are the subject of just criticism, and ought not to be repeated. They were outside the limit of legitimate argument in a criminal case. The judgment must be reversed and a new trial ordered.

LONG, MONTGOMERY and HOOKER, JJ., concurred
with GRANT, J. McGRATH, C. J., concurred in the result.

Supreme Court of Michigan.

Filed December 24, 1895.

PEOPLE v. SMITH.

CRIMINAL LAW—SENTENCE.

A person, convicted of a violation of section 1 of act No. 8 of Public Acts of 1893, may be sentenced to imprisonment in the house of correction and branch of state prison.

Appeal from a judgment convicting defendant of selling liquor on waters within the jurisdiction of the state outside of a city, county or town.

Tweedle & Cross, for appellant.

Fred. A. Maynard, Atty. Gen., and D. G. Warner, Pros. Atty.,
for the People.

MONTGOMERY, J.—The respondent was convicted of a violation of section 1 of Act No. 8 of the Public Acts of 1893. He was sentenced to imprisonment in the house of correction and branch of the state prison at Marquette for six months. The only question raised is whether this sentence was authorized by law. Section 2 of the act in question provides: "Any person who himself or by his clerk, servant, agent or employe, shall violate any of the provisions of section one of this act, shall for the first offense be deemed guilty of a misdemeanor, and upon conviction thereof, be sentenced to pay a fine of not less than fifty nor more than two hundred dollars and the cost of his prosecution, or to be imprisoned in the county jail for not less than forty days nor more than six months, in the discretion of the court. For the second and every subsequent offense so committed he shall be deemed guilty of a felony, and upon conviction thereof in any court of competent jurisdiction, be sentenced to pay a fine of not less than one hundred dollars nor more than six hundred dollars, or to be confined in the state prison for not less than ninety days nor more than two years, in the discretion of the court." This was approved and given effect February 24, 1893. Section 29 of Act No. 118 of the Laws of 1893 reads as follows: "Courts of criminal jurisdiction may sentence to the state house of correction and reformatory at Ionia, all male persons over fifteen years of age and not known to have been previously sentenced to a prison for felony, who shall be convicted of any crime except murder in the first degree; and all male persons over fifteen years of age who shall be convicted of any misdemeanor where the sentence for such crime or misdemeanor shall not be less than six months; and may sentence to the state prison at Jackson any person over the age of fifteen, duly convicted of any crime punishable by imprisonment in said state prison as the courts may deem best; and may sentence to the state house of correction and branch of the state prison, in the Upper Peninsula all persons convicted as is or may be provided by law for sentencing prisoners to any of the

other prisons in this state as the court shall in its discretion deem best." This was given effect May 26th. It cannot be open to question that the terms of this latter law are broad enough to authorize imprisonment in the branch of the state prison and house of correction in the Upper Peninsula; but in *People v. Gobles*, 67 Mich. 475; 35 N. W. 91, it was held that, under the statutes then in force, it was not competent to sentence to the house of correction for an offense which, by a statute enacted after the enactment of the law governing the house of correction, was in terms made punishable by imprisonment in the county jail. Counsel for the people do not contend against the doctrine in this case, but claim that, as Act No. 118 is later than Act No. 8, it operates as an amendment to Act No. 8, by implication. We think this contention sound. It is to be noted that section 29 of Act No. 118 is not merely a re-enactment of existing laws upon the subject. If it were, a different rule of construction might be invoked. But this section contains a substantial amendment of the former law. Under the law as it previously existed, a person convicted of a misdemeanor, when the punishment was not less than ninety days, was subject to confinement in the house of correction at Ionia. 2 How. Ann. St., § 9755. And by section 9807e3, 3 How. Ann. St., it is provided that courts having criminal jurisdiction may sentence to the state house of correction and branch of the state prison in the Upper Peninsula all persons duly convicted before them, as is or may be provided by law for sentencing of prisoners to any of the other prisons in the state. It will be seen that there was a substantial change in the law embodied in section 9755, 2 How. Ann. St., fixing the minimum of imprisonment in these prisons at six months. It cannot be said, therefore, that the subject was not under consideration by the legislature. As before stated, we are unable to say that the enactment does not cover the case. The judgment is affirmed.

McGRATH, C. J., took no part. The other justices concurred.

Supreme Court of Minnesota.

Filed December 24, 1895.

STATE v. ALLRICK.

1. APPEAL—BASTARDY PROCEEDING.

Neither section 6143 of General Statutes of 1894, nor any other statute regarding supersedeas bonds on appeals in civil actions, applies to an appeal from a judgment in bastardy proceedings.

2. SAME—SUPERSEDEAS BOND.

The condition of a supersedeas bond on appeal from such a judgment should be that defendant will pay all costs and charges which may be awarded against him on appeal, and, if the judgment is affirmed or the appeal dismissed, that he will abide by and perform the judgment appealed from, or surrender himself a prisoner, in execution of such judgment.

Appeal from an order to show cause why applicant should not be released from custody pending an appeal from conviction of bastardy.

Henry J. Gjertsen, for appellant.

S. D. Catherwood, for the State.

PER CURIAM.—We held in *State v. Klitzke*, 46 Minn. 343; 49 N. W. 54, that the procedure in appeals in bastardy proceedings is that regulating appeals in civil actions. This must be understood as being subject to the implied qualification "so far as applicable." A judgment in bastardy proceedings is not, in our opinion, "a judgment directing the payment of money," within the meaning of Gen. St., 1894, § 6143. Neither is there any other provision in regard to supersedeas bonds on appeals in civil actions that can apply to an appeal from a judgment in such proceedings. It is really *casus omissus*. Therefore, in determining the form of bond which should be given, the courts must adopt, as far as possible, the analogies of the law in other cases. In our opinion, the conditions of a supersedeas bond on appeal from such a judgment should be that defendant will pay off all costs and

charges which may be awarded against him on appeal, and, if the judgment is affirmed or the appeal dismissed, that he will abide by and perform the judgment appealed from, or surrender himself a prisoner, in execution of said judgment. On giving a bond thus conditioned, in such sum as the court may order, and with such surety or sureties as it may approve, the defendant will be entitled to be discharged from custody pending his appeal. The bond which he gave, and which was accepted by the court commissioner, was not thus conditioned. Hence the court below was justified in vacating the action of the court commissioner, and ordering that the defendant be recommitted. Order to show cause discharged.

Court of General Sessions of the Peace and Jail Delivery of Delaware.

Filed September, 1892.

STATE v. CHIPPEY.

EVIDENCE—CARRYING DEADLY WEAPONS.

Where the weapon is but a few minutes in the possession of a person, not with intent of carrying concealed a deadly weapon, but with intention of keeping the weapon, he is not guilty of carrying concealed a deadly weapon.

Trial of indictment for carrying concealed a deadly weapon.

Branch H. Giles, Dep. Atty. Gen., for the State.

William S. Hilles, for defendant.

CULLEN, J. (charging jury). Watson Chippey stands charged in this indictment with the violation of the statute against carrying concealed a deadly weapon. It is necessary, gentlemen, for us to say to you that this indictment is under a special statute, which has been passed by the legislature for a very wise and useful purpose; and, in order that you may understand this case, it becomes necessary for the court to put a construction upon that statute. Every statute has some purpose and meaning. The

object of this statute is to prevent the carrying of concealed deadly weapons about the person, because persons becoming suddenly angered, and having such a weapon in their pocket, would be likely to use it, which in their sober moments they would not have done, and which could not have been done had not the weapon been upon their person. In order that a person may be convicted under this statute, the spirit and intent of the statute must be violated. Where a person, for instance, in walking along the road, picks up a pistol and puts it in his pocket, or if a man buys a pistol, puts it in his pocket, and carries it home, the act never contemplated that he would be guilty of carrying concealed a deadly weapon, because this is not so carrying a deadly weapon. The mere fact of the person's putting it in his pocket and carrying it home is not a violation of this statute. You have heard the testimony, and from that testimony you must make up your minds whether or not this person is guilty. In the intent and meaning of the statute, was the person carrying concealed a deadly weapon? Was he doing it as a matter of habit? Was he concealing the weapon which he would be likely to use, which the statute is intended to prevent? Those are matters for you to determine. There is testimony, if you believe it, that this person was not the owner of the pistol; that it came into his possession under peculiar circumstances; that it was taken from another person and given to him; that he intended to keep this weapon and restore it to its owner. In other words, the weapon was but for a few minutes in the possession of the person,—not with the intent of carrying concealed the deadly weapon, but with the intention of keeping the weapon, which for the time being was necessarily kept in his pocket. If you believe that testimony, then, under the provisions of this statute, he was not carrying concealed a deadly weapon, for the time being. If a man is drunk and is likely to do some violent act, and you take his pistol from him and thrust it in your pocket, and while grappling with him, he having hold of you and you trying to get loose, a man comes up to you and takes it from you, you are not, according to the meaning and spirit of this act, carrying concealed a deadly weapon. If you

believe this testimony offered here, then this person cannot be convicted. If, on the other hand, you believe from the testimony adduced on the part of the state that this man had this pistol— It matters not where it came from; if he goes to a store and buys a pistol, not for the purpose of carrying it and puts it in his pocket with the intention of carrying it, and is found there with that pistol upon him, and that with the intention of concealing it, then he is carrying concealed a deadly weapon. But you must take the facts and circumstances into consideration, and, according to its meaning, make an application of this statute to them. This case presents just that state of facts, exactly, and we have given you the interpretation to be placed upon this statute. If there should be any doubt in your minds—any reasonable doubt—as to the person's being guilty of this offense, then he would, of course, be entitled to the benefit of the doubt.

Verdict: "Not guilty."

Court of General Sessions of the Peace and Jail Delivery of Delaware.

Filed September, 1892.

STATE v. NORTON.

INDICTMENT—GAMING.

An allegation in an indictment, under revised Code of 1874, p. 786, that it is a game of chance, is unnecessary.

Trial of an indictment for "unlawfully keeping and exhibiting a sweat cloth, on which dice were played for money," under Revised Code, 1874, p. 786, providing for the suppression of gambling.

Branch H. Giles, Dep. Atty. Gen., for the State.

John Biggs, for defendant.

CULLEN, J.—In the first place, in order to sustain this indictment, there must be shown a keeping and exhibiting of some one of the articles mentioned in the act of assembly; and, in the next place, the proof that there had been, by and through that particular instrument, either the playing of cards, playing of dice, “or any other game of chance, for money.” We think the indictment is sufficient.

Mr. Biggs, for the defendant: I understand your honors to rule that they do not have to allege that it is a game of chance?

CULLEN, J.—No; chance is one thing, dice is another, and cards is another.

Court of General Sessions of the Peace and Jail Delivery of Delaware.

Filed May 2, 1892.

STATE v. DAVIS.

INDICTMENT—PROSTITUTION.

Where a female takes a child under fifteen years of age and uses it for the purpose of sexual connection, she is guilty under act March 29, 1889.

Trial of an indictment for taking and using a child under fifteen years of age for the purpose of prostitution.

Branch H. Giles, for the State.

Mr. Carpenter, for defendant.

CULLEN, J. (charging jury).—This is an indictment against Martha E. Davis, alias Martha E. Blizzard, for a violation of the provisions of a statute of this state passed the 29th of March,

1889, entitled "An act for the better protection of female children" (18 Del. Laws, p. 951). The defendant in this indictment is charged in the first count with the using, and in the second count with the taking, a child under fifteen years of age, and using, against the provisions of the statute, for the purpose of sexual intercourse. We have been asked to charge you in relation to the provisions as contained in this act with reference to the indictment itself as supporting the allegations upon which the state contends for a conviction. It is contended on the part of the counsel for the defense that the party as charged in this indictment is not liable under the provisions of this statute. It therefore becomes necessary for us to give you our views as to the construction to be put upon this statute, and as to whether the allegations in this indictment, if proved, are sufficient for you to render a verdict of conviction, under this statute. This statute, you will observe, contains two distinct and separate provisions. The first provision is: "Whoever takes, receives, employs, harbors, or uses, or causes or procures to be taken, received, employed, harbored, or used a female under the age of fifteen years for the purpose of sexual intercourse," etc. And the second provision is: "Or whoever being proprietor or proprietress of any house of prostitution, reputed house of prostitution, or assignation, house of ill-fame, or assignation, harbors or employs any female in any such house, under the age of fifteen years, under any pretext whatever, shall be deemed guilty of a misdemeanor," etc. This indictment is framed under the first provision of this statute, and therefore it is not necessary to speak with regard to the second provision of the same, as it has no reference to this immediate indictment; for the defendant must be convicted of the violation of this statute, if at all, under the first provision; otherwise, she must be acquitted.

There appears never to have been any construction put upon this statute by the courts in our state. It is contended on the part of the defendant's counsel that the meaning of this act is that a party who uses a child under fifteen years of age, in order to be found guilty under the provisions of the statute, must use it for

his own special purpose of having sexual intercourse with that child, and that, therefore, none but a male can be convicted under this provision of the statute. Gentlemen, the court don't think so. We cannot put that construction upon this statute, and it never was intended that such a construction should be put upon it. In the construction of a statute you may look not only to what is called the "preamble" (in this there is no preamble), but you may look to the title of the act, not with reference to its immediate construction, but as showing what was the object of the legislature in passing it. The title, as we have seen, is "An act for the better protection of female children." We must also construe an act by using words according to the general usage. If it is a penal act, then it must be construed strictly in accordance with the meaning; and, if the terms are ambiguous, it may become necessary to take the whole statute together for ascertaining the true meaning; but, where the words employed are words relative to the meaning of which there can be no doubt, then there ceases to be any trouble in interpreting a statute. If the act stopped where it says "uses a female child under fifteen years of age for the purpose of sexual intercourse" (in the first part of the act), then it would admit of the construction that whoever did this did it for his own special purpose; but you cannot strain an act by adding to those words "for the purpose of" the words "his own particular purpose." The act not only embraces that particular class, but "whoever causes or procures to be taken, received, employed, harbored, or used;" implying the case in which the party does not take, harbor, or use himself or herself, but that the female child, for a special purpose, has been used, received, employed (not by the immediate party, under the construction), for the purpose of sexual intercourse. What is the general construction that should be put upon those words "for the purpose of sexual intercourse?" It is nothing more nor less than for the purpose of prostitution. Looking back to the title of the act, we find that it has reference, beyond all question, to preventing the prostitution of children, using the words "for the

purpose of sexual intercourse" as synonymous and equivalent with the words "for the purpose of prostitution."

Much stress has been placed here by the counsel for the defense upon the term "use,"—"whoever shall use for the purpose of sexual intercourse," as confining the word "use" so that it cannot be a female, and that it can only be the party who immediately uses the child for that purpose. When we turn to the definition of the word "use," we find it to make use of; to convert to one's own service; to avail one's self of; to employ; to put to a purpose,—as to use a plow, to use a chair, to use a book, to use time, to use flour for food; to accustom; to habituate, etc. We must use the plain terms which are applicable to that word. It means in this statute that where a party shall take a child for the purpose of sexual intercourse. It does not have reference to the one that immediately uses her. It may be a male, or it may be a female. In the first case, the female, as a matter of course, could not be convicted as far as a male; but where a female takes a child and uses it for the purpose of sexual connection (using the word according to the construction the court places upon it), she would be guilty of this offense.

Then, again, you will observe that the statute provides that "whoever takes, receives, employs, harbors or uses." If the evidence be sufficient to prove that the party charged was guilty under any of those instances of taking, harboring, using, employing, etc., either one would be sufficient. It reduces itself down to this: that this indictment is sufficient under which to convict the party charged with this offense if the proof as made in this case is sufficient to satisfy you that the girl was in the possession of the defendant, and that she was under fifteen years of age. If the child was under fifteen years of age, the defendant was bound to know it. She has no right to prove ignorance of that fact. As far as the proof is concerned with regard to that matter, if not admitted, there is no contradiction as to her true age. It is true there is some proof as to what she said in relation to her own age,—and, of course, the child knows nothing as to her own age,—but the physician testifies in this case that

she was born on the 18th day of August, 1879. Therefore, there can be no question that this child, at the time she went into that house, was under fifteen years of age. In order to make complete this offense, the gist of the offense is in the using of this child for immoral purposes; in other words, using the terms of the act, "for sexual intercourse,"—synonymous with immoral purposes or prostitution. If, then, from the proof you are satisfied—under whatever pretense the child went there, whether she went there herself, whether taken there for any purpose—that, after she was there, this defendant converted to her own use the services of this child, by subjecting her and keeping her for the purpose of sexual intercourse (immoral purposes of prostitution, which amount to the same thing, according to the construction we place upon this act), then, under those circumstances, your verdict should be, "Guilty in manner and form as she stands indicted."

Having stated to you the construction of this statute, we would further say that, before there can be a conviction, the facts as stated in the indictment, according to the law, must be proved to your satisfaction beyond a reasonable doubt. As far as the testimony is concerned, it is not the province of the court to say what construction you are to place upon that. There is testimony here which is conflicting. There are witnesses who testify directly contrary the one to the other. That testimony you are to reconcile, if you can. If you cannot reconcile this, and if, after an examination of the testimony on both sides, there arises in your minds a doubt of such a nature and character that as intelligent men, carefully considering it, you cannot safely come to a conclusion as to whether or not the party charged is guilty of the acts which have been stated here in this case, then she should have the benefit of that doubt, and you should acquit her.

Her counsel has asked us to charge you in relation to this matter of the evidence of keeping a house of ill fame. We say to you that, under the proof, a party may be convicted of this offense if he should live in the finest palace that is in this city,

provided the child was under fifteen years of age, and was kept there in the house for sexual intercourse by anybody whatever, which we say is nothing more nor less than prostitution. But, under this indictment, the proof was admitted, not as being necessary to make complete the offense against this prisoner, but as corroboration; that is, the fact that this party lived in this house, which was a noted house of ill fame, strengthened the charge made against her of using this child for the purpose of sexual intercourse.

The testimony rests with you entirely. You will consider it in all its bearings, and render your verdict accordingly. If you believe that this party is guilty as indicted,—that this child went to this house, and that the defendant induced her to be too intimate with men, to be guilty of having sexual intercourse with certain men, receiving part of the profits, putting it in her own pocket,—then, under the provisions of this act, the court say to you that your verdict should be one of guilty in manner and form as she stands indicted, because it was using a female child under fifteen years of age for sexual intercourse, or prostitution. If, on the other hand, you believe the testimony on the part of the defendant as contradictory of that of the state, and it renders the evidence of such a nature as to make it so exceedingly doubtful and uncertain that fair and intelligent men cannot come to a fair and satisfactory conclusion, then you should give the prisoner the benefit of that doubt, and acquit her.

Verdict: Guilty, with a recommendation to the mercy of the court.

**Court of General Sessions of the Peace and Jail Delivery of
Delaware.**

Filed October, 1892.

STATE v. SMITH.

1. RAPE—DEFINITION.

To constitute the statutory offense of felonious assault with intent to commit a rape, the circumstances must be such as to show that it would have been rape had the assailant carried out his attempt.

2. SAME.

In prosecutions for rape, when the fact of carnal penetration of the female under the age of consent is proven, the law conclusively presumes, without proof, that force was used, and deems the crime complete when properly charged in the indictment.

3. SAME—INDICTMENT.

In an indictment containing an allegation as to rape, it is not necessary to aver that the female upon whom the said offense was said to have been committed, was either under or of the age of consent.

4. SAME—DEFENSE.

It is competent for the prosecution to prove that such female was under or of said age, though such indictment contains no such averment.

5. SAME.

Nor will it be a defense, if at the time of said assault he intended to commit a rape upon her, that he afterwards desisted and abandoned such intent, either because of inability to effect a penetravit, or because he was prevented by the interference of the child's mother, or for any other cause.

6. SAME—CONFESSION.

The whole of what the prisoner said upon the subject at the time of making a confession should be taken together.

7. SAME.

The jury may believe that part of the confession which criminales the accused and reject that part which is in his favor, or vice versa, if they see sufficient grounds for so doing.

8. SAME—CHARACTER.

Where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to very little, if any, consideration or weight.

Trial of an indictment for assault with intent to commit rape upon a female child within the age of four and a half years.

John R. Nicholson, Atty. Gen., for the State.

GRUBB, J. (charging jury).—This indictment which you are impaneled to try is founded upon section 11 of chapter 127 of the Revised Statutes, which provides: "That if any person shall with violence assault any female with intent to commit a rape, such person shall be deemed guilty of felony." This indictment charges that James Corbett Smith, the prisoner at the bar, a certain Emma D. Middleton unlawfully, feloniously, and with violence did assault, with intent her, the said Emma D. Middleton, violently and against her will, feloniously to ravish and carnally know, against the form of the statute, etc. Before you can find the prisoner guilty in manner and form as he stands indicted, you must be satisfied beyond a reasonable doubt, from all the evidence produced at the trial of this case—First, that the assault was made upon the said Emma D. Middleton in the manner described in this indictment; second, that said assault was made by the prisoner; and, third, that it was made upon her with intent to commit a rape, and within this county. An assault is an unlawful attempt by force or violence to do an injury to the person of another, and may be proved by evidence of striking at another with or without a weapon or missile, and whether the aim be missed or not, or by evidence of striking, kicking, or pushing at another with the fists, feet, privy member, or any portion of the assailant's body, and the like, in a manner which conveys to the mind a well-grounded apprehension of personal violence; the person so assaulted being within probable reach of the assailant or of the weapon or missile. There may be an assault without resulting personal injury, since any unlawful attempt, coupled with a present ability, to commit a violent injury to the person of another, is an assault, though the assailant failed to commit the injury intended, owing to the interference of others, or otherwise. But the charge in this indictment comprises not only an assault, but it goes further, and alleges that an assault was made with a felonious intent to rape Emma D. Middleton. To constitute our statutory offense of felonious assault with intent to commit a rape, the circumstances must be such as to show that it would have been rape

had the assailant carried out his attempt; for every ingredient of rape, except an actual penetravit, must be proved. It is therefore necessary for the jury to be informed as to the definition and nature of the crime of rape. Rape, at common law, in this state, has been held to be the carnal knowledge of a woman above the age of ten years against her will; or of a female child under the age of ten years with or against her will, the law considering her incapable of consent. Formerly, in the prosecution for rape, it was held that both penetration and emission were necessary to constitute carnal knowledge, but now, under our statute, the carnal knowledge is deemed complete under proof of an actual penetravit only. While the slightest penetration is sufficient, yet there must be at least proof of some degree of entrance of the male organ within the labia pudendum of the female. Force, either actual or presumptive, is, in legal contemplation, an essential element of rape, whether it be committed on a female over or under the age of consent. Where the carnal knowledge is of a female of the age of consent, there must be actual proof, by either direct or circumstantial evidence, that it was consummated by force, and against her will. But where she is under the age she is deemed incapable of consenting to sexual intercourse, and therefore the law conclusively presumes that carnal knowledge of a female under either the common-law or any statutory age of consent has been accomplished by force and against her will; and no evidence to the contrary can lawfully be received or considered by the jury for the purpose of rebutting or overthrowing this presumption. So that, in prosecutions for rape, when the fact of carnal penetration of a female under the age of consent is proven, the law conclusively presumes, without further proof, that force was used, and deems the crime complete when properly charged in the indictment. But upon proof of carnal penetration of a female of the age of consent—that is, of seven years or more, in this state—the burden is upon the prosecution to further prove to the satisfaction of the jury, beyond a reasonable doubt, that the

penetration was consummated by force and against her will, or by putting her in great fear and terror, before a conviction can be had. In the former case the existence of force is a presumption of law; in the latter, a conclusion of the jury from the actual evidence thereof submitted to them at the trial. The provision of chapter 105, vol. 14, Laws Del., enacted March 28, 1871, in no wise altered the common-law definition and application of rape in this state, except to lower the age of consent of a female child from ten to seven years, and to increase the punishment for carnally knowing and abusing a female child under seven years of age from a noncapital to a capital grade. Our present statutory provisions for the punishment of the crime of rape are contained in section 10 of chapter 127 of the Revised Code, as follows: "Every person who shall commit the crime of rape, or who shall carnally know and abuse any female child under the age of seven years, shall be guilty of felony, and shall suffer death." Both the offense of carnally knowing and abusing a female child under the age of seven years and that of carnally knowing a female above said age by force and against her will are rape, as they come within the common-law definition of that offense. The distinction between them relates solely, as just explained, to the character and amount of proof required to convict of the offense. Accordingly, under our present statutory provisions, prosecutions for rape may be sustained against any person properly charged in the indictment with carnally knowing any female either above or under the age of seven years; and so also may prosecutions under section 11 of chapter 127 of our Code against any person properly charged with feloniously assaulting, with intent to commit a rape, any female either above or under said age.

This indictment under which the prisoner is tried charges him with a felonious assault with intent to commit a rape, and in the usual and technical mode of alleging that offense. As the term "rape," within the meaning and intent of said section 10 of chapter 127 of our Code, embraces all cases of the violation of females of any age, the said charge in this indictment mani-

festily includes those under as well as of statutory age of consent. Its formal allegation of the assault upon the person therein named, with intent her, violently and against her will, feloniously to ravish and carnally know, furnish a description of the offense charged sufficient to plainly and fully inform the prisoner of the nature and cause of the accusation against him, and to apprise him that he is required to be prepared to answer for an assault with intent to rape a female either under or of the age of consent, according as the proof of her age at the trial shall demand. Therefore it is not necessary, in an indictment containing such an allegation, to aver that the female upon whom the said offense was alleged to have been committed was either under or of the age of consent. It is competent for the prosecution to prove that such female was either under or of said age, as the fact may be, although such indictment contains no such averment, for it is sufficient without it.

In the case now before you the prisoner is indicted, not for rape, but for an assault with intent to commit a rape. As already stated to you, every ingredient of rape, except an actual penetration, must be shown to exist, otherwise the prisoner cannot be convicted of said offense. It is the specific, felonious intent to commit a rape which constitutes the offense as charged in this indictment. Therefore, said intent to commit a rape on the body of Emma D. Middleton is a material fact alleged by the state, and is as necessary to be proved by the prosecution, to the satisfaction of the jury beyond a reasonable doubt, as any other essential ingredient of the offense alleged in this indictment, in order to obtain the conviction of the accused in manner and form as he stands indicted. Such specific, felonious intent may be proved by direct evidence, such as the express confession of the accused that he committed the alleged assault with the intent charged. It may also be established by indirect or circumstantial evidence; that is, it may be inferred by the jury from the proven acts and conduct of the prisoner, and the facts and circumstances attending them, which reasonably indicate the alleged intent to commit a rape. The loathsome and shock-

ing details of this alleged offense are all in evidence before you,—the lascivious assault, the seminal discharge, the place of probable concealment, the child's tender age, her exhibition of terror and tears, the condition of her private parts and of her clothing, and other circumstances,—from which, in connection with all the evidence in this case, you are to draw your conclusions in reaching your verdict. If you shall be satisfied beyond a reasonable doubt, from all the evidence before you, that the prisoner placed his privy member against the person of Emma D. Middleton, she then being under the age of seven years, with intent to commit a rape upon her, you may find him guilty in manner and form as he stands indicted; and it will be no defense, if at the time of said assault he intended to commit a rape upon her, that he afterwards desisted, and abandoned such intent, either because of inability to effect a penetravit, or because he was prevented by the interference of the child's mother, or from any other cause. But if you shall not be so satisfied that he made said assault with intent to commit a rape upon her, but shall believe that he made it with some other intent, then you may find him guilty of an assault only.

With respect to verbal confessions of the accused, it is proper here to say that they are to be received with due caution. The degree of credit due to them is to be estimated by the jury, under the circumstances of each case. The whole of what the prisoner said on the subject at the time of making the confession should be taken together. The jury may believe that part which criminales the accused and reject that part which is in his favor, or vice versa, if they see sufficient grounds for doing so; for the jury are at liberty to judge of a confession like other evidence,—that is, in connection with all the circumstances of the case.

In reference to evidence of the prisoner's good character, it may also be observed that it is always admissible. In doubtful cases,—as where there is great conflict of testimony on material and essential points, or where the evidence for and against the accused is pretty nearly balanced,—former good character, if proved, is entitled to due weight, and should incline

the scales in favor of the prisoner. But where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to very little, if any, consideration or weight.

Gentlemen of the jury, you are now to determine, from all the evidence before you, whether or not the assault charged in this indictment was made, and by the prisoner; and also whether or not he made it with intent to commit rape on the body of Emma D. Middleton, and in this county. Under this indictment, you may find him guilty in manner and form as he stands indicted, or guilty only of assault, according as, in your judgment, the evidence may warrant; but, if you do not find him guilty of either, your verdict should be, "Not guilty."

In conclusion, it is our duty to remind you that every accused person is presumed to be innocent until proven guilty beyond a reasonable doubt; but by this is meant, not a vague or fanciful doubt, but such a doubt only as sensible and impartial men may conscientiously entertain after a careful consideration of all the evidence.

Verdict: Guilty.

Supreme Court of North Carolina.

Filed December 17, 1895.

STATE v. LONG.

1. ASSAULT—WHIPPING SCHOLAR.

Where a teacher inflicts upon a pupil such punishment as produces or threatens lasting mischief, or where he inflicts punishment, not in the honest performance of duty, but under the pretext of duty to gratify malice, he is guilty of assault.

2. SAME—INSTRUCTION.

An instruction, in such case, that malice means bad temper, high temper, or quick temper, and if the injury was inflicted from malice, then the jury should convict the defendant, is erroneous.

8. SAME.

The rule, forbidding the use of excessive force, applies to school teachers and all in like situations, as it does to all other persons.

Appeal from a judgment, convicting the defendant of assault.

Burwell, Walker & Cansler, for appellant.

The Attorney General, for the state.

FAIRCLOTH, C. J.—The defendant was convicted for whipping a school child about thirteen years of age. The authority of teachers to correct their pupils for disobedience, and the limitations thereon, have long since been settled.

1. If they inflict such punishment as produces or threatens lasting mischief, they are guilty.

2. If they inflict punishment, not in honest performance of duty, but under the pretext of duty to gratify malice, they are guilty. *State v. Pendergrass*, 2 Dev. & B. 365.

His honor charged the jury: (1) That if the defendant inflicted a permanent injury he was guilty. (2) "Malice means bad temper, high temper, or quick temper; and if the injury was inflicted from malice, as above defined, then they should convict the defendant." This definition of malice is imperfect and misleading. It may exist without temper, and it may not exist although the act may be done while under the influence of temper, bad, high, or quick. It is well defined in *Brooks v. Jones*, II Ired. 260. "General malice is wickedness, a disposition to do wrong, a black and diabolical heart, regardless of social duty, and fatally bent on mischief." This malice against mankind. "Particular malice is ill will, grudge, a desire to be revenged on a particular person." This distinction was not explained to the jury, but the term "malice" was given them with an erroneous definition. Whether the jury rendered a verdict of guilty on the ground of permanent injury, which was a good ground if they so believed, or on the ground of malice, "as above defined," we do not and cannot know, and we must direct that the matter be further inquired of. The error

was in the mistaken definition of malice. As the case goes back, we need not discuss the other matters argued before us. The rule forbidding the use of excessive force applies to school teachers and all in like positions, as it does to all other persons.

New trial.

Supreme Court of North Carolina.

Filed December 17, 1895.

STATE v. BENTON.

SLANDER—MALICE.

Upon the trial of an indictment for slander, an instruction that, if the jury were satisfied beyond a reasonable doubt from the evidence that the defendant said of the plaintiff "she looked like a woman who had miscarried," then he is guilty, is erroneous.

Appeal from a judgment convicting defendant of slandering an innocent woman by maliciously declaring that she was incontinent.

One Ingram Holger, a witness for the state, testified that in August, 1892, he and defendant were working together, and a conversation arose between them as to why Nancy Love had left the school she had been teaching, and gone to Greensboro Female College; that defendant said in this conversation that Miss Love had returned, and looked badly; that defendant saw her at a distance of forty yards, and she "looked like a woman who had miscarried." There was also evidence

on the part of the state that defendant, after he was indicted before a magistrate on this same charge, said that he intended to get witnesses by whom he would prove the charge preferred against Miss Love. There was evidence on the part of defendant that he did not use the words testified to by Hogler, but that what he did say was "that Miss Love looked like she had been confined to her bed with sickness for a long time." It was also denied by defendant through his witnesses that he used the language imputed to him by the state after his indictment before the magistrate.

Special instructions asked by defendant: (1) That the words, "confined to a bed of sickness," do not in law amount to a charge of incontinency. (2) What words amount to such charge is a question of law. (3) That said words are in law not a charge of incontinency, and defendant is not guilty, and the jury should acquit. (4) That the words, "she looked like a woman who had miscarried," do not amount to a charge of incontinency, and the jury should acquit. The court gave Nos. 1, 2, and 3, and refused to give No. 4. Being requested by defendant to reduce the charge to writing, the court gave the following to the jury: "Defendant is indicted under the statute which provides that if any person shall attempt in a wanton and malicious manner to destroy the reputation of an innocent woman by words written or spoken which amount to a charge of incontinency, every person so offending shall be guilty of a misdemeanor. To constitute this offense the words spoken must amount to a charge of actual illicit sexual intercourse. It is admitted in this case that the woman of whom the alleged slanderous words were spoken is chaste and virtuous. If, from the evidence, you find beyond a reasonable doubt that defendant spoke of and concerning Nancy Love that 'she looked like a woman who had miscarried,' then the law would imply malice, as these words of themselves amount to a charge of incontinency when spoken of a single woman, as this woman is admitted to be. If you find that the words spoken were that 'she looked like a woman who had been confined to her bed by sickness,' such words would not

amount to a charge of incontinency, and defendant would not be guilty. The burden is on the state to satisfy you beyond a reasonable doubt that defendant said she looked like a woman who had miscarried. If you so find, then he is guilty; otherwise you will acquit." Defendant excepted to the refusal of the court to give the fourth instruction, and to that portion of the charge to the effect that the words alleged by the state to have been used by defendant implied malice, and were per se slanderous when spoken of an innocent and virtuous single woman,—Miss Love being admitted by defendant to be such.

The Attorney General, for the State.

No counsel, contra.

FAIRCLOTH, C. J. —The defendant is indicted for slandering an innocent woman. The indictment charges that the defendant wantonly and maliciously declared, in substance, that Nancy S. Love was an incontinent woman. The material evidence was that the defendant said that said Nancy "looked like a woman who had miscarried." The court told the jury that if they were satisfied beyond a reasonable doubt from the evidence that the defendant said she "looked like a woman who had miscarried," "then he is guilty, as the law implies malice from such words spoken concerning a single and chaste woman, as Nancy is admitted to be." This was error, as these words do not, without some evidence of the conditions, circumstances, and surroundings under which they were spoken, per se imply that he intended to say that the woman had been guilty of sexual intercourse. It was an expression of an opinion as to her personal appearance, and the defendant was entitled to explain, if he could, what he did mean. Under the charge, however, the jury was bound to render a verdict of guilty, whatever they might have believed, and whatever the defendant may have meant. The expression does not necessarily imply a previous state of pregnancy, as such an appearance might result from some other

cause. In adopting this course we expressly reserve the question, if it comes to us again, whether the same words alone are of such a character as to justify the court in submitting them to a jury upon a question of guilt.

New trial.

Supreme Court of North Carolina.

Filed December 18, 1891.

STATE v. BRITTAIN.

1. EVIDENCE—CONFESSION.

A confession of the wife, made under the influence of and to her husband, is a confidential communication and incompetent as against her.

2. SAME.

When a confession is made through hope or fear, subsequent confessions are presumed to proceed from the same influence, until the contrary is shown by clear proof, and until then the latter confessions are not admissible evidence.

Appeal from a judgment convicting the defendant of incest.

L. L. Witherspoon and Jones & Tillett, for appellants.

The Attorney General, for the state.

FAIRCLOTH, C. J.—The defendants, father and daughter, were indicted for incest. This offense was not indictable at common law, but is so by statute. Code, §§ 1060, 1061. The feme defendant was married to A. M. Williams on the 12th of November, 1893, at whose school she had been a pupil, and was visited by him before marriage. At the time of the marriage she was visibly pregnant, and her child was born on the 26th of February, 1894. About one week after the marriage the husband urged his wife to accuse her father as the father of her

child, and continued to worry her for a week; telling her finally, if she would say so, he would cease worrying her, and stick to her for life, and that, if she did not, he would go to the state of Washington next day, and leave her to sit alone. She at last said she would say yes to what he would say about it. In a week he took her to his father, and at night told her, if she did not state to his stepmother, Rosanna Williams, what she had admitted to him, he would leave for Washington next day. He then took her to Rosanna, and, sitting between them, said: "Now, Brentie, you tell Rosanna what you told me about being guilty of your pa." She then, in that condition, admitted she had been guilty with her pa. After this they slept together as man and wife. After Rosanna had testified, the feme defendant was examined, and admitted that she made the confession under the influence and threats of her husband, but said it was not true, and denied her guilt as charged, and said her husband was the father of her child. On the trial, Rosanna was examined by the state to prove the confession, when the defendants objected on the ground of incompetency, by reason of the facts above stated. The court overruled the objection, stating that the confession was evidence against the feme defendant only. Defendants excepted. Rosanna then testified to the confession. Several other witnesses were examined, and at the close of the evidence the defendants prayed for this instruction: "That, from all the evidence offered in the case, in no aspect thereof is there sufficient evidence to convict." This was refused, and that was error. After verdict, "appeal by the defendants prayed and granted."

As a general rule, evidence competent against one defendant, only, is admissible, with instruction by the court that it shall not be received as evidence against the other. To this general rule the confession in this case is an exception, and is so on the ground of public policy. The relation of husband and wife is confidential,—from unity of interest, and sometimes unity of person, as in case of a joint estate to them. The law requires and extorts this confidence, and it will protect it. Communications be-

tween them cannot be exposed to public view. The interest of the home, the parties, the children, and especially the peace and order of society, forbid it. Lord Coke said: "It hath been resolved by the justices that a wife cannot be produced either against or for her husband quia sunt duae animae in corne una; and it might be a cause of implacable discord and dissension between the husband and wife, and a means of great inconvenience." Co. Litt. 6b. It is true that the confession under consideration does not affect the husband, in a legal sense; but it does effect her, and it violates the principle of public policy above referred to. The first confession was a confidential communication made under the influence of her husband, and soon after the second confession was made, at his instance and in his presence, to Rosanna, who was a competent witness, while the husband was not. We are to assume that the second was made under the same influence that produced the first confession. It being then incompetent against the feme defendant, and incompetent against the male defendant because it was not his confession, the evidence should have been withheld and excluded. We do not know, nor undertake to consider, the weight of evidence before a jury, but no reason appears why incompetent testimony should be heard by a jury. When a confession is made through hope or fear, subsequent confessions are presumed to proceed from the same influence, until the contrary be shown by clear proof, and until then the latter confessions are not admissible evidence. *State v. Roberts*, 1 Dev. 259. The principle of excluding such evidence is ably considered in the opinion in *State v. Jolly*, 3 Dev. & B. 110, indicted for fornication and adultery. There, after a divorce was duly certified, the feme defendant and Jolly were put on trial, and the divorced husband was offered to prove the defendant's adulterous intercourse while the marriage relation existed. It was held that he was incompetent to prove that or any other fact which occurred while the marriage subsisted.

When a person is charged with crime, his answer or his silence may be considered by the jury. The evidence of Dr. Ford does

not fall within that rule, as he did not charge the male defendant with any offense, but talked about reports and whisky.

With the confession excluded, we have no difficulty in holding that the evidence, as a whole, was not of a character to go to the jury on a question of guilt or innocence.

For the errors assigned, there must be a new trial.

CLARK, J. (dissenting).—It cannot be controverted that communications between husband and wife, on grounds of public policy, cannot be given in evidence, and this incompetency cannot be removed by waiver, or by the subsequent divorces of the parties. But there was no offer here to give in such evidence. It was simply a confession of a crime made by a woman who happened at the time to be married, and was made to a third party, not as a transaction or communication made to her husband, but as a substantive, independent confession. She did not state in her confession that she had repeated the substance or any part of it to her husband. It would have been incompetent to have shown that she had done so, either to corroborate or contradict her; but the substantive, independent confession was not rendered incompetent by the fact that perhaps she had also made it to her husband. Nor was the bare fact that she made the confession in the presence of her husband, and at his instance, he (not she) remarking that she had also told it to him, conclusive evidence of duress. There was at this time no evidence of threats or promise. His honor, by overruling the objection raised on that ground, found that there was no duress, and his finding is not reviewable. *State v. Burgwyn*, 87 N. C. 572. Besides, on the evidence, as it then stood, this ruling was correct. The remarks of the husband that she had narrated the matter to him should have been ruled out, if the defendants had asked that it be done, but they did not. If afterwards, when the wife was examined in her own behalf, she testified to a state of facts which tended to show duress, if true, his honor should have been asked to pass upon the sufficiency of this subsequent evidence to show duress by a motion to strike out the confession;

and we cannot hold that it should have been stricken out, certainly not in the absence of any ruling of the court below upon it, and an exception taken. The weight of the evidence was for the jury, and cannot affect the legal questions presented for review.

Supreme Court of North Carolina.

Filed December 20, 1895.

STATE v. SMITH.

1. **EXCISE—SALE.**

Where defendant takes the money of another and furnishes him whisky for it, it is prima facie a sale whether the liquor is delivered at that or another time.

2. **SAME—PRESUMPTION.**

In such case, proof of the sale raises a presumption that it was solicited.

3. **SAME—BURDEN.**

The burden of showing a license is on the defendant.

4. **SAME—AGENT OF PROSECUTING WITNESS.**

It is incumbent on the defendant, in order to excuse himself on the ground that he was the agent of the prosecuting witness, to satisfy the jury that he did actually buy from another in the capacity of such agent, and not as the agent or employe of a person who furnishes the liquor, or as the agent both of such person and the prosecuting witness.

Appeal from superior court, Cherokee county; Graham, Judge.

A witness for the prosecution: "I sent for whisky by defendant. I told him to bring me some liquor. I forget how much money I gave him, but he brought me a quart of whisky. He would be gone two or three hours. I never asked

him where he got it. I paid him nothing for bringing it. This was in this county, within two years prior to this time." The state rested, and defendant introduced no testimony.

Ferguson & Ferguson and Ben. Posey, for appellant.

The Attorney General, for the state.

EVERY, J.—The defendant took the money of the prosecuting witness, and furnished him whisky for it. Prima facie that was a sale, whether the spirits was delivered in ten minutes or ten hours. Black, Intox. Liq. § 503. The burden was upon the defendant to show that he had license if he proposed to rely upon the defense that the sale was not authorized by law (*State v. Emery*, 98 N. C. 668; *State v. Morrison*, 3 Dev. 299; *State v. Wilbourne*, 87 N. C. 529); and therefore proof of the sale raised a presumption that it was illicit. Where a person is shown to have sold spirituous liquors contrary to a local prohibitory law, or in such quantity and manner, or at such place, that the sale would be unlawful without license, the burden is upon the accused, if he would excuse the act on the ground of necessity, to make good the defense. 2 Whart. Cr. Law, § 1506, p. 348, note 5; *State v. Farmer*, 104 N. C. 887; *State v. Brown*, 109 N. C. 807. There was no testimony tending to show that the defendant was acting merely as agent for the purchaser, or in any other capacity than that of seller. Proof that he was acting as agent of one who furnished the spirituous liquors would not have excused him, but would have shown him guilty as principal. 2 Whart. Cr. Law, § 1504.

It is true, as insisted by the defendant's counsel, that this court has never held and does not now give its sanction to the doctrine that the purchaser from an illicit vender, even when he knows him to be such, is *particeps criminis*; and it necessarily follows that the agent through whom he buys is in no worse plight. But it was incumbent on the defendant, in order to excuse himself on that ground, to satisfy the jury that he did actually buy from another in the capacity of agent for the prosecuting witness,

and not as agent or employe of a person who furnished the liquor, or as the agent both of such person and the prosecuting witness. The case is distinguishable from that of *State v. Taylor*, 89 N. C. 577, in that there the declaration of the defendant that he wished a bottle to "get" the liquor in was some evidence which the court held should have gone to the jury for what it was worth, as tending to show a purchase from other person, as the agent of the witness. That was an extreme case, but it is not necessary to follow the suggestion of the attorney general, and question the soundness of the principle there announced by the court, as in our case there is no evidence of agency.

No other testimony being offered but that of the witness Allen, it was not error to instruct the jury, if they believed that, to return a verdict of guilty.

No error.

Supreme Court of North Carolina.

Filed December 23, 1895.

STATE v. WHITT.

1. CRIMINAL LAW—JUDGMENT—SUSPENSION.

A court may suspend a judgment upon the understanding that a defendant will compensate an injured party by payment of money, but the collection of such damages cannot be enforced by imprisonment.

2. SAME.

But when a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure.

3. SAME.

The defendant, at a subsequent term of the court, because of his failure to pay the costs, may have a different judgment entered against him from the former one, which was suspended, if the second is in diminution of the first judgment.

The defendant was sentenced to five years in the county jail of Madison, to be worked on the public roads, pursuant to the statute in such cases provided. During the term of the said court, after an imprisonment of six days, at the suggestion of the solicitor, counsel for the prosecution, the defendant was brought into court, and agreed to pay the prosecutor (his sister) the amount which he had embezzled from her, and the costs of the case. Thereupon the court ordered the clerk to make the entry upon his record, "Judgment suspended." After the adjournment of the court, the attorney for the defendant requested the sheriff to bring the defendant before the clerk, where and when he executed a deed of trust to secure to the prosecutor the amount embezzled and the cost of the action; and, upon the statement of the defendant that he would have the same registered, the clerk directed the sheriff to release him, which was done. Neither the solicitor nor the attorneys for the prosecution were present at the time, nor does it appear that either directed this action. The deed of trust was never delivered to the register by the defendant, nor does it appear what became of it; and at the February, 1895, term of said inferior court, the defendant—being in court, and having failed to pay either the amount embezzled or the costs, upon motion of the solicitor—was prayed into custody, and committed to jail to serve out the sentence hitherto imposed. At this term of court, to wit, February term, 1895, inferior court, the solicitor for the state agreed that if the defendant would file a justified bond in the sum of \$500, conditioned for his appearance at the succeeding June term, 1895, and would show to the court that he had paid to the prosecutor (his sister) the amount he had embezzled from her, and the costs, he would recommend a suspension of the judgment. After the adjournment of the court the defendant, through his attorney, filed a deed of trust on his real estate, in the sum of \$500, conditioned for his appearance at the next term of the inferior court, and

thereupon the defendant was discharged. The inferior court was abolished, and the criminal circuit court succeeded to its jurisdiction. At this (the June) term, 1895, criminal circuit court, Ewart, J., presiding, it appearing to the court that the defendant had neither paid to the prosecutor (his sister) the amount he had embezzled from her, nor the costs, and the records of the inferior court showing that judgment in the cause had been suspended only on motion of the solicitor for judgment, the defendant being present, it was ordered by the court that the defendant, Whitt, be imprisoned for one year in the county jail, to be worked on the public roads under the supervision of the sheriff, as provided by the statute.

V. S. Lusk, for appellant.

The Attorney General, for the state.

MONTGOMERY, J.—The case of *State v. Warren*, 92 N. C. 825, upon which the counsel for defendant chiefly relied, was, we think, not like the case before us. There the judgment of the court was that defendant be confined for twelve months in the county jail, and he had entered upon the term of imprisonment. During the same term of the court, upon defendant's paying the costs of the prosecution, and also certain other costs in other matters against him, which he really did not owe, and upon his further entering into bond to keep the peace and also to keep sober, the judgment was suspended, and he was discharged. Some months afterwards, while drunk, he committed an assault upon a man, and was arrested for the breach of the peace and the breach of the bond. Upon the hearing the court construed the former proceedings as a vacation of the sentence, and its suspension to await the defendant's observance of the conditions imposed, and pronounced judgment for the reimprisonment of defendant for the same period of twelve months. On appeal from this judgment the court said: "The legal effect of the record, according to our interpretation, is a remission of the rest of the imprisonment upon the terms and conditions which

were accepted and carried into effect by defendant." In the case now before us the defendant, after undergoing six days' imprisonment under a term of five years pronounced against him, was brought before the court during the same term, and upon his agreeing to pay the costs of prosecution into court, and to his sister the amount he had embezzled from her, "judgment was suspended." He failed to pay the costs (and also failed to pay to his sister the amount which he agreed to pay her; an immaterial matter for present purposes), and in consequence thereof was arrested, and compelled to give bond for his appearance at the June term of the criminal court of Buncombe county. Before the term of that court arrived, a new court—the criminal circuit court of Buncombe and other counties—was established by Act 1895, c. 75. By the statute creating the new court the business then pending in the criminal court was placed under the jurisdiction of the criminal circuit court. At the June term of the last-named court, judgment was pronounced on defendant, that he be imprisoned for one year because he had neither paid the amount he promised his sister nor the costs. It is well settled in this state that the judgments of a court are under its control, and subject to change or modification, during the term at which they are rendered. So, then, it was in the power of the presiding officer of the criminal court to suspend the judgment on the defendant at the time when he did, on defendant's agreement to pay the costs, even though he had served a part of his term of imprisonment. The question then arises as to whether the defendant, at a subsequent term of the court, because of his failure to pay the costs, may have a different judgment entered against him from the former one, which was suspended. The second judgment, in diminution of the first, is certainly lawful. *State v. Crook*, 115 N. C. 760. The first judgment was for five years' imprisonment, the last for one year. It is to be borne in mind that we are considering the judgment of the criminal circuit court against the defendant only as based on his failure to pay the costs against him in the indictment and conviction on which judgment was suspended, and not in his failure to meet

the agreement with his sister. A court may suspend judgment upon the understanding that a defendant will compensate an injured party by payment of money, but it adds no force to such a condition to make it a matter of record. The collection of such damages cannot be enforced by imprisonment without coming in conflict with the constitutional inhibition against imprisonment for debt. When a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure. *State v. Crook, supra.*

No error

Supreme Court of Washington.

April 12, 1896.

BOKIEN v. STATE.

1. APPEAL—MANDAMUS.

Where no bond is filed or money deposited by appellant within the time prescribed at law or at all, the case remains precisely as it was before the appeal was attempted.

2. SAME—PAUPER.

The fact that the appellant is a pauper does not, of itself, relieve him from the necessity of giving an appeal bond.

Appeal from an order denying a writ of mandamus.

Francis W. Cushman, Chas. Ethelbert Claypool and Edward E. Cushman, for appellant.

ANDERS, J.—Applicant was tried in the superior court of Pierce county upon an information charging him with the offense of obtaining property under false pretenses. From a judgment of conviction in that action he appealed to this court in forma pauperis. In order to properly prepare his record on appeal, he

conceived it to be necessary to obtain a typewritten copy of all the evidence introduced upon the trial, and other proceedings had therein, not already a part of the record, and accordingly requested the respondents, and especially the clerk of the superior court, to furnish the same to him at the expense of the county. His request was refused, and he thereupon instituted this proceeding in the superior court to compel the respondents to furnish him this record free of charge. An alternative writ of mandate was issued as prayed in the petition, and on the return day thereof the respondents appeared and moved to quash the writ, and also demurred to the affidavit and to the petition, on the ground that they, and each of them, failed to state facts sufficient to entitle the plaintiff to relief. The motion was granted, the demurrer sustained, and the proceedings dismissed, at the cost of the petitioner. From said orders and judgment the petitioner appealed.

As stated by counsel for appellant, there is but one point in this case, and that is whether or not the defendant in a criminal action, who appeals in *forma pauperis*, is entitled to a typewritten copy of the testimony and the rulings of the trial court, at the county's expense, under and by virtue of the acts of March 8, 1893, relating to exceptions and appeals. The question is one of considerable importance, and has never been directly passed upon by this court; nor can it now be determined, for the reason that the appeal in this instance has become ineffectual, and this court is therefore without jurisdiction of the cause. *Mandamus* is a civil proceeding (High, *Extr. Rem.*, 2nd ed., § 4), and the statute provides that "an appeal in a civil action or proceeding shall become ineffectual for any purpose unless at or before the time when the notice of appeal is given or served, or within five days thereafter, an appeal bond to the adverse party conditioned for the payment of costs and damages as prescribed in section seven of this act, be filed with the clerk of the superior court, or money in the sum of two hundred dollars be deposited with the clerk in lieu thereof. * * *" Laws 1893, p. 122, § 6. No bond was filed or money deposited by appellant within the time prescribed

by law or at all, and consequently the case remains precisely as it was before the appeal was attempted. "The fact that appellant is a pauper does not, of itself, relieve him from the necessity of giving an appeal bond. There must be express statutory authority for an appeal in forma pauperis." 1 Enc. Pl. & Prac., p. 999. There is no statute in this state authorizing an appeal in forma pauperis in civil cases, and hence appeals must be taken and perfected in the same manner by all appellants, whether rich or indigent.

The appeal is dismissed.

HOYT, C. J., and GORDON, J., concur.

Supreme Court of North Carolina.

Filed December 23, 1895.

STATE v. BLANKINSHIP.

APPEAL—EXCEPTIONS—WAIVER.

Where an exception, though the refusal to charge is excepted to, is not set out by the appellant in stating his case on appeal, it is waived.

J. M. Gudger, Jr., for appellant.

The Attorney General, for the State.

CLARK, J.—The defendant asked certain instructions which were not given. The refusal is deemed excepted to, but, if the exception is not set out by the appellant in stating his case on appeal, it is waived. *Taylor v. Plummer*, 105 N. C. 56; *Marshall v. Stine*, 112 N. C. 697; *Davis v. Duval*, 112 N. C. 833. Indeed, no exception whatever appears to have been made, and,

no error appearing upon the face of the record proper, the judgment must be affirmed. See numerous cases cited in Clark's Code, p. 582, subhead, "Where No Errors are Assigned."

Affirmed.

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. STROHBEHN.

APPEAL.—RECORD.

In the absence of a statement in the abstract that it contains all the evidence, the court cannot consider the objection that the verdict is not supported by the evidence.

Appeal from a judgment convicting the defendant of the crime of rape.

Schmidt & Vollmer, for appellant.

Milton Remley, Atty. Gen., for the state.

DEEMER, J.—There is no statement in the abstract that we have all the evidence, nor does it purport to contain the entire record. True, we have a copy of the certificate of the shorthand reporter, and of the bill of exceptions signed by the judge, but they are not sufficient. *State v. Hogan*, 81 Iowa, 747, 45 N. W. 903; *State v. Day*, 58 Iowa, 678, 12 N. W. 297; *State v. French* (decided at the present term) 65 N. W. 156. On the first page of the abstract, we find this statement: "Agreed Abstract of Record." This would ordinarily be sufficient, in the absence of a denial, to show that the abstract was agreed to. But in this case the abstract does not purport to be signed by any one, not even by the attorneys for appellant; and the attorney general, in effect, denies that the abstract was agreed to. If we should hold, however, that it is an agreed abstract, we cannot give it

any more extended effect than it purports on its face to have. All that can properly be claimed for it is that it shows that certain witnesses' testimony was taken upon the trial in shorthand, and that afterwards these notes were extended and filed in court, and this testimony is set forth in the abstract. There is no claim anywhere that this was all the testimony introduced upon the trial, and no agreement to this effect, even if it be conceded that the abstract is an agreed one. The principal complaint lodged against the verdict is that it is not supported by the evidence. As we do not have all that was introduced in the court below, we cannot consider this objection.

2. Certain instructions are complained of. We have examined each and all which are attacked, and find that they contain correct statements of the law. Whether they were applicable to the facts proved, or whether the court erred in not giving more elaborate ones, we cannot determine, for the reasons stated in the first division of this opinion.

For the reasons stated the judgment is affirmed.

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. COX.

APPEAL—RECORD.

Where the record is fully presented, but without briefs or argument, it is the duty of the court to examine the record.

Appeal from a judgment adjudging the defendant guilty of rape.

Lynn & Sullivan, for appellant.

Milton Remley, Atty. Gen., for the state.

PER CURIAM.—The record in this case seems to be fully presented, but without briefs or argument. It is our duty in such a case to examine the record, which we have done. The evidence is not of the most satisfactory character, but it is such that the questions were for the determination of the jury, and we should not disturb its findings. In our reading of the instructions we discovered no error or unfairness in the submission of the case. The defendant's rights seemed to be well guarded in presenting the law. The judgment is imprisonment in the penitentiary for five years. If the defendant is guilty, the punishment is not excessive.

The judgment is affirmed.

Supreme Court of Iowa.

Filed December 11, 1895.

[STATE v. LEWIS.

WITNESS—PRIVILEGE.

Where a witness is, upon his refusal to answer questions before the grand jury, taken before the court, the court may, after fully instructing him as to his rights, direct him to return for further examination before the grand jury.

2. SAME—GRAND JURY.

The examination of a witness before the grand jury is no part of the record of the court.

3. CRIMINAL LAW—INDICTMENT—INDORSEMENT

Section 4337 of the Code does not require that the names of witnesses before the grand jury who gave no material testimony should be indorsed on the indictment nor that the minutes of the testimony shall be returned and made of record.

4. WITNESS—GRAND JURY.

The grand jury may examine a witness, so long as he is not required to answer questions which may incriminate him.

5. CRIMINAL LAW—EXTORTION.

The statute is directed against threats to accuse another of a crime, or to do any injury to the property of another with intent to extort.

6. SAME—INDICTMENT.

In statutes, which make different acts a crime, and state the acts disjunctively, all of the acts may be set out in the indictment in conjunctive form.

7. SAME.

An indictment for extortion is not insufficient because the threatening words, writings and printed communications are not set out therein.

8. SAME—ASSISTANT COUNSEL FOR PROSECUTION.

Attorneys, whose alleged employment by defendant is not complete, but merely conditional, and who had made no investigation of his defense and sustained toward him no confidential relations growing out of not consulting with him in reference to the case, may be allowed to appear as assistant counsel in the case in behalf of the state.

9. EVIDENCE—EXTORTION—CODEFENDANT.

Where defendant and another are jointly indicted and charged with making threats to extort money, and the court carefully guards the rights of the defendant by proper instructions, evidence of the acts of his co-defendant are properly admitted.

10. SAME—SIMILAR ATTEMPTS.

Upon the trial of an indictment for conspiracy to commit extortion, the prosecution may be permitted to introduce evidence concerning other instances of extortion and attempts to extort for the purpose of aiding the jury in determining with what intent defendant acted in the transaction set out in the indictment.

11. NEW TRIAL—NEWLY DISCOVERED EVIDENCE.

A motion for a new trial on the ground of newly discovered evidence will be overruled where the evidence was discovered before the close of the trial.

Lewis, Holmes & Beardsley and M. C. Jay, for appellant.

Milton Remley, Atty. Gen., T. F. Bevington, Co. Atty. Woodbury Co., P. Farrell, Co. Atty. Plymouth Co., and George W. Argo, for the state.

ROTHROCK, J.—1. It is necessary to make a statement of facts preliminary to the finding of the indictment, to the end that some of the questions presented by the appeal may be understood. It appears that in the summer and fall of the year 1892 there were sold and circulated in Sioux City a large number of copies of a weekly newspaper called the "Sunday Sun." The paper was printed in the city of Chicago, and large numbers

were sent to Sioux City for sale. The defendant Lewis was in charge of the circulation in Sioux City. He had an office or place of business, and he held himself out as the local editor; that is, he had charge of the preparation and furnishing the local items or articles which it was thought would cause a demand for the papers at that place. The paper purported to be published in the interest of good morals, and to correct and reform the character and standing of the people in the localities where it was put in circulation. It is unnecessary to state more in the way of facts, in this connection, than that this whole record shows that the object of the publication was to extort money from prominent citizens, by means of threats and covert insinuations of the purpose to expose their crimes and shortcomings in said newspaper. In some cases knowledge was brought to the victims selected, of the purpose to publicly expose them, by squibs and innuendoes in the paper. In other cases the purpose was made manifest by actual notice of the proposed exposure. The result was that many of the persons thus threatened paid considerable sums of money in order to suppress the proposed publication, and thus save themselves from public obloquy and disgrace. At the time of the publication and sale of the newspaper, the appellant, Hart, was a resident of Dakota City, in Nebraska, some six miles from Sioux City. He was not ostensibly connected with Lewis in the sale and distribution of the papers. The ground upon which the prosecution claimed that he was a guilty party in the enterprise was that the facts show that he was the hypocrite or go-between, who made settlements with the victims, and that, while he was sharing the profits of the business, he did so by pretending that he was actuated by pure friendship for the persons threatened, and without recompense or reward. The defendant Lewis was arrested on several warrants issued by justices of the peace. The appellant, Hart, was also arrested on two warrants; but his cases were continued, and when the grand jury which found the indictment in this case, as well as several other indictments against Lewis, and one or more indictments against another party, was organized, there

had been no preliminary examination on the prosecutions against Hart. The grand jury convened on the 19th day of January, 1893, and proceeded to investigate the charges of extortion against Lewis. A subpoena was issued for Hart to appear forthwith before the grand jury, that he might be examined as a witness. There is some claim made that he was arrested on the subpoena, and many other statements are made as to hurrying him into the jury room against his consent. This is disputed, and, as we think what occurred before the grand jury is no part of the record in this case, we will not undertake to settle that dispute. It is conceded, that Hart asked to consult his attorneys, and was allowed to do so, and the grand jury then proceed to examine him as a witness. He refused to answer any questions touching the charges against Lewis. Section 4287 of the Code is as follows: "When a witness under examination before the grand jury refuses to testify or to answer a question put to him by the grand jury, the grand jury shall proceed with the witness into the presence of the court and the foreman shall then distinctly state to the court the refusal of the witness, and if the court upon hearing the witness shall decide that he is bound to testify or answer the questions propounded he shall inquire of the witness if he persists in his refusal, and if he does shall proceed with him as in cases of similar refusal in open court." When appellant refused to answer questions, he was taken before the court, as required by this statute. It is not an extravagant statement to say that the proceedings before the court were such as probably never before occurred in a court of justice. The questions were propounded to the witness, and he refused to answer. Counsel for the state examined the witness for a time. Counsel for the witness asked for an order on the justices of the peace to bring in their dockets to show up the cases on preliminary examination, and the order was made, and the justices of the peace were examined in reference thereto. The witness continued his refusal to answer, but later on he made answer to the questions, in these words, "I refuse to answer because the answer might tend to expose me to a criminal charge,

and because the answer might constitute a link in the chain of evidence that would subject me to a criminal charge." After a lengthy examination, which was interspersed with objections and arguments,—the counsel for the witness contending that the state had no right to examine the witness before the grand jury, or to require him to appear to testify to any fact in connection with the Sunday Sun publication, and counsel for the state contending that the witness should be compelled to testify to all facts which would not tend to criminate him,—the matter was concluded, and the court decided that under the facts the witness should return to the grand jury for further examination. In the course of the decision the court used this language: "As I understand, any man may be called before the grand jury in any case, and may be asked any question which, in the judgment of the grand jury, is pertinent to the matter under investigation. It is the right of the grand jury. It is the right of the party called, when called and questioned, to claim his privilege, and refuse to answer because the answer would tend to criminate him. Now, if he refuses to answer on these grounds, unless the court is satisfied that he is mistaken as to that, I think the court ought to excuse him from answering, and in this case the ruling of the court will be that the witness is excused from answering, in view of the record as it now stands." There was surely no just ground of complaint because the court directed the witness to return for further examination before the jury. He was fully instructed as to his rights, and it would have been an unwarranted exercise of judicial power to direct the grand jury that they should not proceed with a proper examination of the witness.

2. The grand jury returned to the jury room, and the witness was further examined. Several indictments were found against the parties engaged in the Sunday Sun enterprise. Hart's name was not indorsed as a witness on any of the indictments, and no minutes of his evidence were returned by the grand jury to the court. After the filing of the indictments, the appellant filed a motion asking that the testimony of appellant taken before the

grand jury by the stenographic reporter who was appointed clerk to the grand jury during said investigation, be attached and made part of the record in the cause. This motion was overruled. We think this ruling was correct. The examination of the witness before the grand jury is no part of the record of the court. The law requires that when an indictment is found the names of all witnesses on whose evidence it is found must be indorsed thereon, before it is presented to the court, and the minutes of the evidence of such witnesses must be presented with the indictment to the court, and filed by the clerk of the court, and remain in his office as a record. Code, § 4293. As we have said, Hart's name was not indorsed on the indictment, and the minutes of his evidence were not returned. They were no more a part of the record than any other evidence which the grand jury did not think of sufficient importance to return as part of the evidence upon which the indictment was found. Notwithstanding the refusal to make the stenographic reports of record, the counsel for appellant, assuming that it is of record, because it was presented with the motion which was overruled, claims that the examination of the defendant as a witness is ground for setting aside the indictment. It is true that the statute (Code, § 4337) provides that the indictment must be set aside "when the names of all the witnesses examined before the grand jury are not indorsed thereon; when the minutes of the evidence of the witness examined before the grand jury are not returned therewith." But this does not require that the names of witnesses before the grand jury who gave no material testimony should be indorsed on the indictment. *State v. Little*, 42 Iowa, 51. And surely, if the grand jury should be of opinion that the name should not be indorsed for that reason, there can be no requirement that the minutes of the testimony shall be returned and made of record. A number of adjudged cases are cited by counsel upon the subject of the right of a party to be exempt from testifying to facts which connect him with the commission of crime. Nearly all of these cases arise upon the refusal of a witness to testify, and

his rights in proceedings against him for contempt for such refusal. It is a general rule that no one can be required to testify in any case, or in any legal proceedings, to facts which would tend to render him criminally liable, and that rule is part of our statutory law. Code, § 3647. But we know of no reason why a witness before a grand jury may not be examined as to a criminal charge, as against another, even though he may be liable to prosecution for the same offense. That is no reason why a grand jury may not examine him as a witness, so long as he is not required to answer questions which may criminate him. The law exonerates him from answering self-criminating questions, but it goes no further than that. We have given this question quite full consideration, because in the printed and oral arguments it appeared to us to be the main ground upon which a reversal was demanded; and we may say in conclusion that under the law in this state, as settled in the case of *State v. Little*, supra, these minutes are not only no part of the record in the case, but that the court had no authority to make them of record.

3. Another ground of the motion to set aside the indictment was that the grand jury was not selected, drawn, and summoned as required by law. We will not set out the evidence in connection with this objection to the indictment. The abstract filed by the state, when considered in connection with appellant's abstract, shows that the jury was selected and drawn in substantial compliance with all the statutory requirements.

4. After the motion was overruled the defendant filed a demurrer to the indictment, upon the following grounds: "(1) That it does not substantially conform to the requirements of the Code, in that it attempts to charge more than one offense; (2) the statements of facts in the indictment are insufficient to constitute a crime." The statute under which the indictment was found is as follows: "If any person either verbally or by written or printed communication, maliciously threaten to accuse another of a crime or offense, or to do any injury to the person or property of another with intent thereby to extort any money or pecuniary advantage whatever, or to compel the person so

threatened to do any act against his will he shall be punished," etc. The indictment was in these words: "The said J. L. Lewis and Atlee Hart, on or about the 15th day of November, in the year of our Lord one thousand eight hundred and ninety-two, in the county aforesaid, did unlawfully, willfully, maliciously, and feloniously, by verbal, written, and printed communications, threaten to accuse Daniel T. Hedges and Daniel T. Gilman of having carnal knowledge of certain women, whose names are to the grand jury unknown, and of being guilty of a crime and offense, to wit, the crime of adultery, said Daniel T. Hedges and Daniel T. Gilman being then and there married men, each of them having a lawful wife living; and did then and there, unlawfully, willfully, maliciously, and feloniously, by said verbal, written, and printed communications, further maliciously threaten to wrongfully injure the persons and property of said Daniel T. Hedges and Daniel T. Gilman; the said Daniel T. Hedges and Daniel T. Gilman being then and there bankers and real-estate men, and being engaged in the banking and real-estate business; that is to say, to maliciously injure, greatly damage, and break down their said business, and to prevent, hinder, and delay said Daniel T. Hedges and Daniel T. Gilman from successfully and profitably carrying on and conducting their said business, causing loss and ruin to the same; all done with intent on the part of said defendants thereby to extort from said Daniel T. Hedges and Daniel T. Gilman a large sum of money, to wit, twelve hundred dollars, and to compel the said Daniel T. Hedges and Daniel T. Gilman, so threatened, to deliver to said defendants, against the will of said Daniel T. Hedges and Daniel T. Gilman, money as aforesaid; all done by said defendants in violation of law, and against the statute in such case made and provided." Section 5685 of the Code (McLain's Ann. Code) provides that an indictment must charge but one offense. It is argued in behalf of appellant that the indictment is bad because it charges that the defendants threatened to accuse Hedges and Gilman of the crime of adultery, being one offense, and also threatened to wrongfully injure the person and property of

Hedges and Gilman, which is another offense. We think this is a mistaken view of the indictment, and of the statute under which it was found. The statute is directed against threats to accuse another of a crime, or to do any injury to the property of another, with intent to extort. It has uniformly been held by this court that in statutes like this, which make different acts a crime, and state the acts disjunctively, all of the acts may be set out in the indictment in conjunctive form. *State v. Barrett*, 8 Iowa, 539; *State v. Baughman*, 20 Iowa, 498; and many other cases to be found in our digests. The rule is well expressed in 1 Bish. Cr. Proc. § 586, as follows: "If a statute makes it a crime to do this or that, mentioning several things disjunctively, all may be charged in a simple count, but it must be the conjunctive 'and' where 'or' occurs in the statute. All are but one offense, committed in different ways, and proof of it in any one of the ways will sustain the allegation." Under the second ground of demurrer, it is insisted that the indictment is insufficient because the threatening words, writings, and printed communications should be set out in the indictment. We do not think this was required. The thought of counsel appears to be that the crime of making threats with intent to extort is like cases of slander and libel, where the slanderous words or libelous writings are required to be pleaded. In this indictment the threat is set out in general terms, as a threat to accuse Hedges and Gilman of the crime of adultery. This is sufficient. *State v. Moulton*, 108 Mass. 307.

5. The demurrer having been overruled, the next question arose upon an objection by defendant to the firm of Argo, McDuffie & Kichman being allowed to appear as assistant counsel in the case, in behalf of the state. The ground of the objection was that said firm had been employed to assist in the defense of appellant, and had abandoned the employment, and for that reason they should not be allowed to aid the prosecution. A full hearing was had on this matter. Affidavits were presented and witnesses were examined in open court, and the court decided that there was no just ground for sustaining the objections. We will not discuss the evidence on this side issue in the case. The

whole of the evidence has been examined, and the decision of the court is in the record; and we concur with that decision, in holding that the alleged employment of the firm by defendant was not complete, but merely conditional, and that they had made no investigation of the appellant's defense, and sustained towards him no confidential relations growing out of any consultation with him in reference to the case. The objections were properly overruled.

6. We have now reached the trial of the case. No objection was made upon the impaneling of the jury. Many witnesses were examined on the part of the prosecution. It is urged with great earnestness that the verdict was without support in the evidence, and that the motion for a new trial should have been sustained on that ground. We have given the facts disclosed in the evidence most careful consideration, which has taken much time, as the abstracts in the case are unusually voluminous, being nearly six hundred pages. Of course, it will be understood that we ought not to undertake to discuss the evidence in detail. It will be sufficient to state our conclusions. The Sunday Sun was circulated and sold by Lewis in Sioux City for two purposes. One was the revenue derived from its sale, which arose largely from the fact that it was known to be a sensational publication, depending on patronage by reason of its attacks upon leading citizens of the city. The other, and, so far as appears from the record, its principal, source of revenue, was the money received from those who were threatened with exposure in its columns. The threats were not open and direct, but they were none the less threats, the same as if the statements were made that if money was not paid the publication of the scandal would appear. The question of the defendant's guilt depends upon the fact whether the evidence shows that he was associated and acted in conjunction with Lewis in the scheme to extort money. As we have said the theory of the defense is that he had no connection with Lewis, further than to intercede with him, and obtain from him terms of settlement with the persons selected as victims. We think the jury was fully warranted in finding

that the claim of friendship was a mere pretense. The instances in which he made settlements are too numerous to be attributed to disinterested friendship. It appears to have been generally understood that he was the person who effected the settlements. In one or more instances he took promissory notes payable to his own order. And there is direct evidence as to his guilt in the attempt to extort from Gilman and Hedges. We do not regard it as necessary to further discuss the question as to the general effect of the evidence. The record is full of facts and circumstances which point plainly and clearly to his guilt.

7. It is said that the court erred in permitting the prosecution to introduce evidence concerning other instances of extortion and attempts to extort than that set forth in the indictment. It is to be remembered that Lewis and Hart were jointly indicted, and jointly charged with making threats to extort money from Gilman and Hedges. The court carefully guarded the rights of the defendant as to these acts by instructing the jury, unless it was found from the evidence that there was a general conspiracy or agreement entered into by Lewis and Hart to carry on a general system of extortion, the acts of Lewis should not be considered as evidence against Hart. And the jury were further instructed that evidence tending to show that Hart was connected with other similar offenses should be considered only for the purpose of aiding the jury in determining with what intent Hart acted in the transaction set out in the indictment. When these other facts and circumstances were thus guarded, there was no error in permitting the introduction of the evidence last above referred to. *State v. Saunders*, 68 Iowa, 370, 27 N. W. 455; *State v. Jamison*, 74 Iowa, 617, 38 N. W. 509. In 7 Am. & Eng. Enc. Law, 780, it is said, "It is now generally held that, for the purpose of proving the intent, evidence of similar pretenses made about the time and in the same neighborhood, to other persons, of the pretenses alleged in the indictment, may be introduced." It is unnecessary to cite authority in support of the correctness of the ruling admitting evidence of the acts of Lewis upon the theory that the defendants were engaged

jointly in a common undertaking to profit by extortion from such victims as they might select as subjects. The rule is elementary. And we do not think that any improper evidence of this kind was introduced. It all appears to relate to a time while the joint enterprise was being carried out.

8. There are many other alleged errors presented and discussed by counsel, which we do not think demand special mention. We have examined them, and find no error. They relate to alleged errors in the admission and exclusion of evidence, errors in the charge to the jury, and in refusing to give instructions asked by the defendant. The instructions given were full and complete, and covered every question necessary to be considered under the evidence, and they are in accord with instructions in criminal cases which have been frequently approved by this court. One ground of the motion for a new trial was founded upon newly-discovered evidence supported and resisted by affidavits. The court did not err in overruling this motion, if for no other reason than that the evidence was discovered before the close of the trial.

The judgment of the district court is affirmed.

Supreme Court of Iowa.

Filed December 11, 1895.

STATE v. FEURERHAKEN.

1. EVIDENCE—RECEIVING STOLEN GOODS.

It is competent, on the trial for receiving stolen goods, to show by witnesses, who actually stole the goods, the previous course of dealing between them and the defendant.

2. CRIMINAL LAW—RECEIVING STOLEN GOODS—INSTRUCTION.

An instruction, upon such trial, that, if the jury "find that all the facts and circumstances surrounding the receiving of the goods by defendant were such as would reasonably satisfy a man of defendant's age and intelligence that the goods were stolen, or if he failed to follow up such inquiry so suggested, for fear he would learn the truth and know the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge," is not objectionable.

3. INDICTMENT—DUPLICITY.

Though the words are used disjunctively in the statute which makes it a crime for any one to buy, receive or aid in concealing any stolen goods, etc., it is good pleading to use them in the indictment in conjunction, and such use does not involve more than one charge.

4. SAME.

In such indictment, it is not necessary to name the person from whom the goods were received.

5. SAME—ACCOMPLICE—CORROBORATION.

It is not necessary that an accomplice should be corroborated to every material fact to which he testifies.

6. SAME.

The corroboration need not be by the testimony of witnesses alone; it is sufficient if it be by circumstances or circumstantial evidence.

7. SAME—WEIGHT.

The weight of the corroborating evidence is for the jury.

Appeal from a judgment convicting defendant of the crime of receiving stolen goods.

Flickinger Bros., for appellant.

Milton Remley, Atty. Gen., for the State.

DEEMER, J.—Defendant was charged with having received and aided in concealing certain dry goods, consisting, among other things, of sixty-three hoods, ninety-four handkerchiefs, twenty and one-half yards of veiling, one hundred and sixty-six yards of lace, ten hose supporters, eight belts, and other property, of the aggregate value of \$82.93. It is further charged that this property was all stolen from the Chicago & Northwestern Railway Company, and that the defendant knew it was stolen

at the time he received it. The state relied upon the testimony of Adolf Kolb and Peter Knecht, who, it seems, stole the property, together with the testimony of other witnesses, tending to show that the goods were actually stolen, that they were concealed by the defendant, and that, upon being accused of having received the stolen goods, defendant at first denied it, but afterwards disclosed their whereabouts to the officer who was searching therefor.

1. In the examination of the witness Kolb, the state was permitted to inquire into transactions between him and defendant with reference to other stolen property at a time antedating the commission of the crime charged, and the same line of examination was permitted as to the witness Knecht. And in the fifth instruction given by the court the jury were told, in substance, that they might consider these transactions for the purpose of determining whether he received the goods in question with knowledge of their having been stolen. Each and all of these matters are complained of. We think there is no doubt of the correctness of this procedure. It was certainly competent to show the previous course of dealings between these parties; for if defendant had, prior to the time in question, been receiving from these men property which he knew to have been stolen, it certainly tends to show his knowledge that these particular goods were stolen.

2. In another instruction the court, among other things, said: "If you find that all the facts and circumstance surrounding the receiving of the goods by defendant were such as would reasonably satisfy a man of defendant's age and intelligence that the goods were stolen, or if he failed to follow up such inquiry so suggested, for fear he would learn the truth and know that the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge," etc. The use of the word "rigidly" is objected to. Taken in connection with the whole instruction, we think it means no more than "to the same extent," or "exactly," and that with this meaning there is no error.

3. The indictment charges defendant with having bought, received, and aided in concealing stolen goods. It is claimed that it is bad for duplicity. The statute makes it a crime for any one to buy, receive, or aid in concealing any stolen goods, etc. The words are used in the statute disjunctively, and in the indictment in conjunction. This is proper pleading, and does not involve more than the one charge. *State v. Phipps* (Iowa) 64 N. W. 411, and cases cited. See, also, *State v. Lewis* (decided at present term) 65 N. W. 295. It is said the indictment is bad because it does not state of whom the goods were received, nor who the defendant aided in concealing them, nor that defendant received them with a felonious intent, or with intent to deprive the owner thereof. The indictment, however, does charge a felonious intent to defraud the Chicago & Northwestern Railway Company. It is not necessary to name the person of whom the goods were received. There is no such requirement in the statute, and such a statement is not needed to enable a person of common understanding to know what is intended, or the court to pronounce judgment, upon a conviction, according to the law of the case. The case of *Shriedly v. State*, 23 Ohio St. 139, is directly in point. See, also, 2 Bish. Cr. Proc. § 927.

4. In the seventh instruction the court told the jury, in effect, that they could not convict on the testimony of Kolb and Knecht unless they were corroborated by other evidence tending to connect the defendant with the commission of the offense charged, and that this corroborating evidence must go "not only to the fact of receiving the goods, but also to the fact that the goods were stolen." The instruction is complained of because it does not also require corroboration of the testimony of these accomplices to the fact that defendant knew the goods were stolen when he received them. The instruction is clearly in line with the thought expressed in the case of *Upton v. State*, 5 Iowa, 466. And it is familiar doctrine that "it is not necessary that an accomplice should be corroborated in every material fact to which he testifies. If the jury are satisfied he speaks the

truth in some material part of his testimony, in which they see him confirmed by unimpeachable evidence, this may be ground for believing that he also speaks the truth in other parts, as to which there may be no confirmation." *State v. Van Winkle*, 80 Iowa, 15, 45 N. W. 388. But the instruction complained of proceeds as follows: "But the corroboration need not be by the testimony of witnesses alone. It is sufficient if it be by circumstances or circumstantial evidence. And in this case, if it is shown that the goods in question, or some part thereof, were found in the possession of the defendant, and if it is also shown that the defendant concealed or hid them, or denied having them, when the parties called to search the house, such evidence would be corroborating evidence; but the weight and sufficiency of the corroboration you must determine." Taking the whole instruction together, and construing it in the light of the testimony, we think there is no error, whatever may be said as to the incompleteness of the first part of it, before referred to. The case of *Jenkins v. State* (Wis) 21 N. W. 232, supports the conclusions here announced. See, also, 1 Am. & Eng. Enc. Law, note to page 80; *Reg. v. Birkett*, 8 Car. & P. 732; *Com. v. Savory*, 10 Cush. 535; *People v. Weldon* (N. Y. App.) 19 N. E. 279. Another point made against the instruction is that there is no evidence to sustain the last paragraph. Some of the testimony has evidently been overlooked by appellant's counsel, who, we may observe, did not try the case in the court below. There is evidence tending to show that defendant denied having received the goods, and to the effect that they were concealed in a back room, in an old chest, "covered over with a lot of old harness and other stuff."

5. It is further contended that the evidence is not sufficient to justify the verdict. This is predicated largely upon the thought that there was no corroboration of the testimony of Kolb and Knecht; for, if their testimony is to be believed, and they are corroborated as the law requires, there can be no doubt of the correctness of the verdict. As has already been stated, we find there is corroborating evidence to sustain these accomplices,

and, under well-known rules, its weight was for the jury, and we cannot interfere. Copies of some affidavits made by these accomplices are appended to appellant's argument. These we cannot consider. They should be taken to another department of government for consideration. We are united in the conclusion that, while the evidence as to guilty knowledge may not be conclusive, yet we cannot interfere.

Affirmed.

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. KOWOLSKI.

1. HIGHWAYS—STEAM ENGINES.

Under chapter 68, Acts 24 Gen. Assem., the law as to the stopping of the engine and the keeping of a man in front is alike applicable to all teams that are to pass the engine, whether from front or rear.

2. APPEAL—HARMLESS.

The exclusion of a proper question is no ground for reversal, where the same fact appears from the evidence admitted as the excluded testimony was intended to establish.

3. HIGHWAYS—STEAM ENGINES—DEFENSE.

The avoidance of danger by leaving the traveled track is not a valid excuse for the violation of the specific provision in the statute as to the crossing of culverts with such engines.

4. SAME.

Upon the trial of an information under said act, the refusal of the court to permit defendant to show that he kept a person on the lookout, but in a different way from that prescribed by law, is right.

5. SAME—INSTRUCTION.

Upon such trial, an instruction that a person operating such engine on the highway must stop it for the passage of teams passing either way, unless to stop would be dangerous to life or limb, is not objectionable.

6. SAME—INDICTMENT—DUPLICITY.

An information, under said statute, which charges the offense as having been committed by failure to have a man in front of the engine, and also in failing to stop, is not bad for duplicity.

Appeal from a judgment adjudging defendant guilty of propelling a steam engine on the highway without having a competent man in front, and in not stopping such engine as by law required.

Welch & Welch, for appellants.

Jesse A. Miller, with Milton Remley, Atty. Gen., for the State.

GRANGER, J.—The following is the charging part of the indictment: "For said defendants did on or about September 3, 1894, in South Fork township, said county, drive, or cause to be driven, a steam engine, being propelled by steam, on and over the public highway, and did not have a competent man in front of said engine, to assist persons passing the same to control their horses or animals, and did not stop said engine when one hundred yards distant from persons going on said highway with horses or other animals, until the same had passed, and failed to render any assistance to any one passing on the public highway, contrary to the statute," etc. The cause of the complaint, as shown by the evidence, is that, while defendants were moving their engine and thresher along the highway, the thresher being about one hundred feet behind the engine, a Mrs. Williamson, with her little girl, and another lady, driving a horse, came up and passed the thresher, and as they approached the engine it turned out of the track, as they supposed, to let them pass, and as they were

opposite the engine the horse took fright and ran away. The indictment is founded on the following provisions of chapter 68, Acts 24th Gen. Assem.: "That it shall be the duty of persons in charge of steam engines, being propelled upon the highways of the state, wholly, or in part by steam power, to stop said engine whenever it is 100 yards distant from any person or persons going on said highway with horses or other animals until said horses or other animals shall have passed, and sooner in case said horses or other animals become frightened before arriving at said distance. The owner or driver of said engine shall also keep a competent man not less than fifty nor more than one hundred yards in front of said engine, to assist in controlling any horse or other animal being driven or used on said highway, until said horses or other animals shall have passed by said engine, and it shall be the duty of said man to use all reasonable care and diligence to prevent the occurrence of any accidents which might result in case said horses or other animals become frightened at said steam engine. Any owner of a steam engine, who by himself, agent or employes shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor, and upon conviction therefor, for each offense shall be fined," etc.

1. We will have disposed of the most important branch of this case by considering a claim of appellants that there can be no conviction for the reason that the statute requiring the engine to be stopped, and a competent man to be kept in front of the engine, has no application to a case where persons with horses are approaching the engine from the rear. The claim is based on such thoughts as that it could not have been contemplated that an engine should be stopped when horses approaching from the rear were one hundred yards distant, because it could not be assumed that they would attempt to pass; also, that where teams were traveling in the same direction, and ahead of the engine, because it would not be assumed that the engine would overtake and pass the team; but it is said to apply to cases in which persons with teams are traveling in the opposite direction, so as to meet the engine, for then the purpose of having the man in front, and

of stopping the engine, is manifest. It is said that the man in front could not be of use to a team approaching from the rear, and many plausible thoughts are suggested to support appellants' contention. It will be well to first look to the evil that the statute was designed to correct. The steam engine, on the public highway, when the act in question was passed, was of recent date. Its unusual appearance, and the noise incident to its locomotion, made its movements on the highway dangerous to persons traveling with teams, and the legislative purpose was to prevent accidents likely to occur without such legislation. While it might be said that persons traveling in the opposite direction would more necessarily come in contract with such an engine than those going in the same direction, either in front or rear, it is not to be correctly said that the latter is not liable for such contact; for it is a matter of common observance that teams going on the highway, in the same direction, pass and repass as the purpose or pleasure of the persons in charge may require. We have no reason for assuming that a different custom, either from choice or necessity, obtains as to teams and the engine. The facts that control the speed of teams on the highway are so varied that uniformity in that respect is not contemplated, and nothing the law seems designed to place restrictions thereon. We are not prepared to say that the legislature had in view security for persons or teams traveling in any particular direction, but rather that it designed the law to operate favorably as to all. It may be necessary for a team in the rear of an engine to pass it, and it may also be necessary for an engine to pass a team going in the same direction. These necessities may arise from many causes, and we think the law was designed to operate in all such cases. It is true that, if an engine is to pass a team, it cannot do so if standing; but whether or not it should stop, and, by the aid of the man in advance, take steps for the safety of the team, we need not determine. The question is not before us. The law should not be too literally construed. It will not bear the construction that the man required to be in advance shall at all times be there. The requirement that he shall assist in

controlling animals until they have passed the engine clearly indicates his duty on the approach of teams, and we think it immaterial from which way the team approaches. If the engine stops because of a team to pass from the rear, he is not required to remain in front, but to use reasonable diligence to prevent the occurrence of accidents, just as he would if the team approached from the front. The law requires the engine to be stopped "whenever it is one hundred yards distant from any person or persons going on said highway with horses or other animals." This language, in itself, is as applicable to persons going one way as the other. The fact that teams going in the opposite direction are more likely to pass the engine probably led to the provision that the man should be in advance; but nothing in the language fixing his location when not assisting with teams should be construed to the prejudice of teams actually passing or to pass, and needing such assistance. The object of the statute was to make safe the passing of teams. It was intended that the man in advance should be on the lookout, and the more available position was thought to be in front. His position when no team or animal requires his assistance in passing is as fixed by the statute. When a team is discovered, the purpose of the statute as to the place where he shall be is answered, and a duty follows that has no reference to the place from which he is to observe the approach of teams, and his place then is wherever it is necessary to render the assistance. Our conclusion is that, as to all teams that are to pass the engine, the law as to the stopping of the engine and the keeping of a man in front is alike applicable. If, with the precautions provided by the law, a team coming from either direction cannot be discovered, so as to stop the engine, another question might be presented. But the duty of keeping the man on the lookout is imperative, and its disregard is a violation of the law.

2. The defendant Kowolski was a witness, and after stating that he turned aside with the engine to avoid a culvert in the highway, and that he was crossing the lowest place, where the water runs, when the buggy passed, he said: "I did stop, but

as soon as I stopped it was soft, and the side where it was soft kept going down. The engine was sinking or giving way. Then I started up and pulled out." He was then asked, "Could you have stopped there, in your judgment?" The court excluded the question as leading. Without a further question, the witness then said, "It settled on one side more than on the other." He was then asked, "State what effect, if any, that the settling would have on the engine." The question was excluded as leading. The latter question is far from leading, and the first is not objectionably so. But there is no prejudice, for it conclusively appears that the engine was stopped, and then started because it was sinking. The purpose of the witness was to show that it could not be stopped, because, if stopped, it would sink into the mud. It appears that the engine was turned aside to this wet place to go around a culvert. The law makes a specific provision as to crossing culverts with such engines, and it seems that the defendant left the traveled track, and sought to pass the culvert through this wet place. We do not think the defendant could observe the requirements of the law in that way, even if such danger could, in any event, be a valid excuse.

3. The court refused to permit the defendant to show by evidence that a Mr. Shane was kept on the lookout, but in a different way from that prescribed by law. In this the court was right. The law fixes the conditions on which these engines may be propelled on the highway. Even though another way may be, just as good, still it is not a conformity with the law, and will not invoke its protection.

4. The court said to the jury that a person operating such an engine on the highway must stop it for the passage of teams passing either way, unless to stop would be dangerous to life or limb. Appellants' criticism of the instruction is that it should have stated that, if the circumstances were such as to lead an ordinarily careful and prudent man to believe it would be dangerous to life or limb, it should excuse the failure to stop. It will be noticed that the instruction does not hold to a rule that, to excuse a failure to stop, the circumstances must be such that to

stop would actually result in a loss of life or limb, but that there must be danger of such result. We think this means only that the situation must be such that such a result would reasonably be apprehended. It cannot well be said but that one may be in danger of being injured, without actual injury. We think the criticism is without merit, and we may say it is doubtful if the legal effect of the language suggested by appellants would be different from that given.

5. It will be seen that the information charged the offense as having been committed by a failure to have a man in front of the engine, and also in failing to stop. Because of this, it is said that the information is bad for duplicity,—that it charges two offenses. The information is laid under section 1 of the act above quoted. Section 4 provides: “Any owner of a steam engine who by himself, agent or employe shall violate any of the provisions of this act shall be deemed guilty of a misdemeanor,” etc. Section 2 provides how bridges and culverts shall be crossed. Section 3 provides that the whistle shall not be blown on the highway. We understand the word “provisions,” as used in the fourth section, to refer to the different sections,—the first providing how the engine shall be operated along the highway, the second how bridges and highways may be crossed, and the third that the whistle shall not be blown. Now, the provision as to how the engine must be operated on the highway may be violated in either or both of the ways specified; but, if the failure to post the man and stop the engine are simultaneous, they relate to the one act of operating the engine, and, although either neglect would make the offense complete, they are only different ways of committing the same offense. The case of *State v. Myers*, 10 Iowa, 448, fully sustains this view. Of the information in this case it may be said, as of the indictment in that case, that it “described only one offense in fact, the guilt of which might be incurred in either method specified.” Some other questions have been referred to in argument, but our considerations are conclusive of all, and the judgment is affirmed.

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. ADDISON.**APPEAL—RECORD.**

Where, upon an appeal from the district to the supreme court, the record does not contain the evidence or instructions of the district court, and no error is discovered, the judgment will be affirmed.

Milton Remley, Atty. Gen., for the State.

KINNE, J.—This cause is submitted upon a transcript containing copies of the information filed with the justice of the peace of the verdict in the district court, of the judgment entry, of the appeal bond and notice of appeal, from which it appears that the defendants were by the justice of the peace found guilty of knowingly hauling in a vehicle, upon the public highway, dead hogs, which had died with the swine plague, or hog cholera. A fine was imposed therefor, and the defendants appealed to the district court, where, upon a trial to a jury, they were again convicted, and sentenced to pay a fine. They appeal to this court. The record does not contain the evidence or instructions of the district court. We have examined so much of the record as is before us, and discover no error. *Affirmed.*

Supreme Court of Iowa.

Filed December 12, 1895.

STATE v. EIFERT.**1. INDICTMENT—BANKS AND BANKING.**

Where the act complained of is stated in the indictment with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged, it is competent.

2. SAME.

An indictment, which charges that defendant, being engaged in the banking and deposit business, and insolvent, knowingly accepted from one M. a deposit, sufficiently states who was the owner of the money deposited and who was defrauded.

3. WITNESS—CROSS EXAMINATION.

The cross-examination must be confined to the matters about which the direct testimony was given.

4. SAME.

Where the defendant undertakes to explain his connection or want of connection, with the deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tends to contradict his testimony in chief, or which more fully discloses his connection with the deposit, is proper.

5. SAME.—WAIVER.

Though the cross-examination is improper, the defendant waives any error connected therewith, by testifying, in the further progress of the trial, to the same facts without objection.

6. BANKS AND BANKING—PRINCIPAL AND AGENT.

A person whose agent, without his knowledge or authority, and in discharge of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but the principal may, after coming into possession of all of the facts, so ratify the act theretofore done, as to make it binding upon himself and the basis of a criminal liability.

7. SAME.

When the principal, in such case, after full knowledge of all the facts, fails to repudiate the acts of his agent and takes no steps looking to a return of the deposit to the depositor, he then knowingly receives and accepts the deposit.

Appeal from a judgment convicting defendant of fraudulent banking.

Gibson & Dawson, for appellant.

Milton Remley, Atty. Gen., and Jesse A. Miller, for the State.

KINNE, J.—The indictment charges the defendant with the crime of fraudulent banking, committed as follows: "The said Henry Eifert, on the 15th day of August, in the year of our Lord one thousand eight hundred and ninety-three, in the county aforesaid, being then and there engaged in the banking and deposit business, under the name and style of Bank of Tripoli, and then and there being insolvent, and well knowing himself to be insolvent, did knowingly accept and receive from C. H. Mohling a deposit in his banking and deposit business, the sum of one hundred dollars, consisting of gold and silver money, national bank bills, United States treasury notes and currency, and other notes, bills, and drafts circulating as money and currency, the particular description to the grand jury unknown, to the amount and of the value of one hundred dollars, contrary to the form of the statute in such cases made and provided." The sufficiency of this indictment was questioned by a demurrer, which was overruled, and an exception taken. It is urged that it is defective,

in that it does not state who the money alleged to have been deposited belonged to, or who was the owner of it, or entitled to its possession; that it fails to aver who, if any one, was defrauded. Section 1 of the act against fraudulent banking prohibits any bank, banking house, or party engaged in banking or deposit business from accepting or receiving on deposit any money when such banking house or deposit office, firm, or party is insolvent. Acts 18th Gen. Assem. c. 153, § 1. Section 2 is as follows: "If any such bank, banking house, exchange broker or deposit office, firm, company, corporation, or party, shall receive or accept on deposit any such deposits as aforesaid, when insolvent, any officer, director, cashier, manager, member, party or managing party thereof, knowing of such insolvency, who shall knowingly receive or accept, be accessory, or permit or connive at the receiving or accepting on deposit therein, or thereby, any such deposits as aforesaid, shall be guilty of a felony, and upon conviction, shall be punished by imprisonment in the state prison for a term not to exceed ten years, or by imprisonment in the county jail not to exceed one year or both fine and imprisonment, the fine not to exceed ten thousand dollars." Acts 18th Gen. Assem. c. 153, § 2. In support of the contention that the indictment is defective because it fails to state the name of the injured party, counsel rely upon cases decided by this court wherein it was held that the indictment, in certain cases, must set out the name of the person injured, or attempted to be injured. We do not think it is necessary to discuss these cases. Let it be conceded that the indictment in this case must show who the injured party is, and we think it must be held to conform to the law in that respect. It occurs to us that one reading this indictment would at once understand that the charge was that the money belonged to the person making the deposit; that he was the owner. If the act complained of is stated with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged, it is sufficient. Code, § 4305. Can there be any doubt that such a person, on reading this

indictment, would understand that it charged that the defendant, knowing that he was insolvent, did knowingly receive a deposit of money from Mohling, and that it was his money which was thus deposited? We think not. Now, one may own money, and may send it by some one to be deposited in a bank, but we should not speak of the mere carrier of the money as a depositor, but the one for whom it was in fact taken to the bank would be the depositor. The owners of money deposited in a bank are the depositors of that bank; that is, they are the people who made the deposits. We think that, read in the light of the requirements of our statute, the indictment, to the common understanding, as fairly charges that Mohling was the injured party as if it had in express terms stated that he owned the money which he deposited.

2. It is strenuously urged that the court erred in permitting certain questions to be asked the defendant on cross-examination. It appeared from the direct examination that the defendant undertook to state his connection, or rather want of connection, with the making of the alleged deposit. He testified that he left town that morning early, and went to Waverly; that, prior to going, he had a conversation with his son about receiving deposits on that day; that he told him he was going to Waverly to look the ground over; and that, if things did not look favorable, he would send the son a telephone message, through a party who was with him, not to receive any more deposits, and to stop doing business; that he sent the message to his son to stop doing business, and not to receive any more deposits. On cross-examination, over the defendant's objection, he was required to testify when he returned from Waverly to Tripoli, and how long he remained in Tripoli, and as to whether he found any deposit had been made after two o'clock that day. The law, undoubtedly, is that the cross-examination must be confined to the matters about which the direct testimony is given. It is contended that on cross-examination the state was limited to what the defendant did at Waverly. We do not think so. The defendant was put upon the stand to show that Mohling's deposit was received without

his knowledge and against his instructions; and, to show such facts, he testified as we have stated. The defendant having undertaken to explain his connection, or want of connection, with this deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tended to contradict his testimony in chief, or which more fully disclosed his connection with this deposit, was proper. There was no error in the rulings in this respect. Even if the cross-examination was improper, the defendant waived any error connected therewith, because, in the further progress of the trial, he testified to the same facts without objection. *State v. Wickliff* (Iowa) 64 N. W. 283; *Strong v. Railway Co.* (Iowa) 62 N. W. 802; *Bailey v. Bailey* (Iowa) 63 N. W. 341.

3. The eighth paragraph of the court's charge reads: "In determining whether the defendant received or accepted the alleged deposit of C. H. Mohling, you are instructed that it is not necessary that the evidence should show, or that you should find, that the defendant in person received such deposit, nor that he was personally present when it was received from said Mohling, if received at all; it is enough if it was received by the cashier or agent of defendant under his authority. But you are further instructed that even though the defendant instructed Theodore Eifert to close the bank, and refuse to receive or accept further deposits, and that, after such instructions to so refuse deposits, the said Theodore Eifert did accept and receive from said Mohling the deposit in question, if so you find from the evidence, still, if the defendant, with knowledge thereof, accepted and retained as a deposit the amount so received from said Mohling by said Theodore Eifert, and placed among and treated it as a part of the funds or assets of the bank, having full knowledge from what source and under what circumstances and by whom it was received, he will be deemed to have knowingly accepted such sum as a deposit. If, however, such deposit was received without his authority, and was not accepted by him, if at all, with full knowledge of the manner and circumstances of its being deposited, if at all, then he will not be deemed to have knowingly received or

accepted such deposit." Exception is taken to so much of this instruction as relates to the action of the defendant in knowingly accepting and retaining the deposit, after full knowledge from whom and under what circumstances it had been made. The argument of defendant is that when the deposit was received and accepted by defendant's son, and entered upon the books of the bank and upon the depositor's book, the whole transaction was concluded. Now, the facts appear to be that the son had for a long time been in the bank, assisting his father; that the father was in the city of Waverly when the son, who had charge of the bank, received this deposit; that it was received on the afternoon of August 15, 1893, and several hours after the son had received a telephone message from his father to close the bank and to take no more deposits; that the father returned to Tripoli the same evening, and then learned that this deposit had been received, contrary to order; that said money was put into the assets of the bank; and that defendant never paid or tendered it back to Mohling. Now, when did defendant "knowingly accept and receive" this money as charged in the indictment? We think he must be said to have done so when he returned home, and first knew of the fact of its receipt. If he had given no direction to stop business and refuse deposits, then it might be said that he should be concluded by the transaction when the money was in fact received by his son, who had authority to act for him. But, having expressly directed the son to cease business and refuse deposits, he had no reason to suspect or believe that his orders would not be obeyed. It cannot therefore be said that he knowingly received and accepted the deposit when it was handed to his son, and by him accepted, without the father's knowledge, and against his express directions. When, however, he arrived home that evening, he became acquainted with all the facts; he then knew that this deposit had been accepted by the son after he had directed him to take no more deposits; he knew who made the deposit; he knew he was then insolvent, and that he had been before the son had received the deposit; and, knowing all the facts, he did not repudiate the transaction, but retained and accepted the

money, at the same time knowing that his bank would never open again. It seems to us that when defendant, after full knowledge of all the facts, on the evening after his return, failed to repudiate the act of his son, and took no steps looking to a return of the deposit of Mohling, he then knowingly received and accepted the deposit. It must be borne in mind that this is not a civil action for damages for the recovery of the money deposited. It may be that in such a case recovery could be had of the defendant, notwithstanding the deposit was received by his agent contrary to his directions. But the gist of the offense charged in the prosecution is in knowingly receiving and accepting a deposit, knowing that he was then insolvent. Surely one whose agent, without his knowledge or authority, and in disobedience of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but it cannot be doubted that, after coming into possession of all of the facts, the principal may so ratify the act theretofore done as to make it binding upon himself, and the basis of a criminal liability. If the defendant had, on being acquainted with what had been done, promptly disavowed the act of his son, and returned the deposit to Mohling, he would not have been guilty, as it could not then have been said that he had knowingly received and accepted the deposit. It seems to us the instruction is correct, and quite as favorable to the defendant as he had a right to expect.

4. Finally, it is said that the verdict is contrary to the evidence. This conclusion is reached by counsel on the theory that the acts considered in the third division of this opinion, and held by us to justify the instruction complained of, do not, if established, show a violation of the statute. We think the evidence fully sustains the verdict. Indeed, it is difficult to understand, under our view of the law, how the jury could have reached a different conclusion.

Discovering no error in the entire record, the judgment below is affirmed.

Supreme Judicial Court of Massachusetts.

Filed January 3, 1896.

COMMONWEALTH v. EMERSON.

LOTTERY—WHAT CONSTITUTES.

The offer of a choice out of a number of photographs to each purchaser of tobacco where the buyer is free to make his own choice before he takes the tobacco, is not a violation of chapter 277 of 1884.

Appeal from a judgment convicting defendant of selling property on a representation that something other than what was specifically stated to be the subject of sale was to be delivered.

John D. McLaughlin, Asst. Dist. Atty., for the commonwealth.

J. Otis Wardwell and Forrest C. Manchester, for defendant.

HOLMES, J.—This is a complaint for a penalty under St. 1884, c. 277. The evidence was that the defendant, a retail dealer in tobacco, displayed in his shop window a large number of photographs of distinguished or notorious men and women, with an advertisement that each purchaser of a piece of a certain tobacco was entitled to one of these photographs. Upon each piece of tobacco was a label to the like effect, and the defendant told a witness that every purchaser was entitled to a photograph, and to make his own selection. The witness testified that he bought a piece of tobacco, and chose a photograph, and stated that every purchaser knew what he was buying before he made the trade.

We are of opinion that the statute ought not to be construed to apply to such a case as this. The act is entitled "An act to prevent the sale or exchange of property under the inducement that a gift or prize is to be part of the transaction." The sale prohibited is a sale upon any representation "that anything other than what is specifically stated to be the subject of the sale" is

to be delivered, etc. We must give these words a reasonable meaning. They were not intended, and do not purport, to forbid a sale of two things at once, even if one of them is the principal object of desire, and the other an additional inducement which turns the scale. If that had been the object, it would have been simpler and hardly more sweeping to have forbidden altogether the sale of more than one thing at a time. But the aim of this statute is to prevent offers of bargains which appeal to the gambling instinct, and induce people to buy what they do not want by the promise of a gift or prize, the precise nature of which is not known at the moment of making the purchase. There was nothing of that sort in the present case. All that was sold was "specifically stated to be the subject of the sale," and we think it very plain that, if the offer of a single photograph with the tobacco would have been lawful, the offer of a choice out of a number is no less so, the buyer being free to make his choice before he takes the tobacco. It follows that the court should have ruled that the complaint could not be maintained, although the ground on which the ruling was asked was a different one from that on which we rest our decision.

Verdict set aside.

Supreme Judicial Court of Massachusetts.

Filed January 6, 1896.

COMMONWEALTH v. BISHOP.

1. CRIMINAL LAW—ACCOMPLICE.

The court is not bound to advise the jury that generally it is unsafe to convict on the testimony of an accomplice, where such testimony is uncorroborated, though courts sometimes do so.

2. SAME.

Where the court instructs the jury that the witness, who furnished the principal evidence for the government, was an accomplice who had turned state's evidence to avoid the consequences of his part in the affair, and that they were to take the circumstances into consideration in weighing his testimony, it may, in view of the above rule, refuse a request on the part of defendant for fuller instructions as to the uncorroborated testimony of an accomplice.

3. EVIDENCE—SECONDARY.

Where the court is warranted in assuming that the defendant refused to admit the receipt of, or to produce, a paper, he is justified, irrespective of any question of the sufficiency of the notice to produce it, in admitting secondary evidence of its contents.

4. SAME—ABORTION.

Upon a trial for abortion, testimony that witness went to a newspaper office, bought a paper, looked at the advertisements, and, in consequence of seeing an advertisement, went to the defendant's office, is not objectionable, where he had testified previously that he asked defendant to procure the abortion.

5. SAME—JOINT INDICTMENT.

Where an alleged accomplice was tried at same time with defendant, it is discretionary with the court to admit against the accomplice evidence not admissible against defendant, provided it instructs the jury not to consider such evidence against the latter.

6. WITNESS—EXAMINATION.

When a witness has testified directly to a fact from the experience of his own senses, the extent to which he should be allowed to testify to circumstances corroborative of the truth of what he has thus sworn must rest in the discretion of the judge who tries the case.

7. EVIDENCE—DYING DECLARATIONS.

The existence of any expectation of recovery, however slight, makes dying declarations inadmissible.

8. SAME.

If such declarations are admitted in evidence, the court may consider whether the evidence is sufficient to warrant the findings on which the court proceeds, but cannot revise the findings of fact.

9. SAME.

If the evidence is excluded it is an end of the matter, unless some question of law is reserved.

'Appeal from a judgment convicting defendant of abortion.

John D. McLaughlin, Dist. Atty., for the commonwealth.

Clarence W. Rowley, for defendant.

HOLMES, J.—This is an indictment for doing certain acts upon the body of one Petrene Matson with intent to procure an abortion, in consequence of which the said Petrene died. The case is here on exceptions which we will take up in the order in which they are discussed by the defendant.

1. The indictment contained two counts, the second count charging a similar offense upon another woman. The defendant moved for separate trials on the two counts, upon which motion the court suspended action, and, when the evidence of the government was in, granted it. The exception on this point is not

pressed, it being admitted to be a matter within the discretion of the judge. *Com. v. McCluskey*, 123 Mass. 401.

2. The court instructed the jury that one Carl F. Monk, the witness who furnished the principal evidence for the government, was an accomplice who had turned state's evidence to avoid the consequences of his part in the affair, and that they were to take the circumstance into consideration in weighing his testimony. At the close of the charge the defendant asked for fuller instructions as to the uncorroborated testimony of an accomplice, which the court refused. It is settled that the court is not bound to advise the jury that generally it is unsafe to convict on such testimony, although courts sometimes do so. Advice upon the matter is, in substance, instructing the jury that there is a presumption of fact concerning the veracity of a certain class of witnesses. Although it is permissible, and in many cases may be desirable, to advise in the form above mentioned, the general rule, under our practice, is to leave such presumptions to the jury, and it is in the discretion of the presiding judge to follow the general rule rather than the exception, if it seems best to him to do so. *Com. v. Wilson*, 152 Mass. 12, 14; 25 N. E. 16; *Com. v. Clune*, 162 Mass. 206, 214; 38 N. E. 435. See *Com. v. Briant*, 142 Mass. 463, 464; 8 N. E. 338; *Graham v. Badger*, 164 Mass. 42, 47; 41 N. E. 61.

In this case the evidence was not wholly uncorroborated. The defendant admitted that he published advertisements which, to say the least, might be understood to hold out that he was ready to do acts of the kind charged, and it appeared by another witness that the defendant wanted to see him, in order that the alleged accomplice should employ the defendant's lawyer, and that the defendant showed some anxiety to avoid the accomplice after the latter had been arrested. The defendant's conversations with the witness, taken as a whole, might have been interpreted, also, to admit, by implication, the witness' suggestion to the defendant that he "thought he did a job for him," and to warrant the inference that the job referred to was the alleged crime.

3. Monk testified that the defendant Bishop gave him a slip of paper to take to a certain address, along with the said Petrene Matson, and that he took it there, and delivered it to the defendant Cole. The counsel for Cole declined to ask his client whether she admitted the receipt of the alleged paper. The court thereupon admitted secondary evidence of its contents, which appeared to be directions in the case of Matson after the operation. If Cole had admitted that she had accepted such a paper without repudiating what it implied, the fact would have been very strong evidence against her. It is plain, therefore, that the judge was warranted in assuming that Cole refused to admit the receipt of the paper, or to produce it, irrespective of any question of the sufficiency of the notice to produce it, and if he was of that opinion he was warranted in letting in the evidence as against Bishop.

4. Monk also testified that he went to the Globe office and bought a Sunday Globe, looked at the advertisements, and in consequence of seeing an advertisement went to the defendant's office, where he had testified before that he asked the defendant to procure the abortion. This matter is one of those usual preliminaries which hardly could have been objected to if it had stood alone. If it was connected with the defendant's admission that he advertised in the Globe, and his statement of what he advertised, it fairly warranted the inference that the witness went to the defendant in pursuance of an offer of the latter to the public.

5. One Cole, an alleged accomplice of the defendant, other than the above-mentioned witness, was tried at the same time. On every occasion when evidence was admitted against Cole which was not admissible against this defendant, the court instructed the jury that it was not to be considered against this defendant. There is nothing to show that this course was not within the discretion of the court, or that its discretion was not exercised wisely. *Com. v. Bingham*, 158 Mass. 169; 33 N. E. 341. There is no need, therefore, to consider particular objections to evidence admitted only against Cole, who, it may be mentioned, was acquitted by direction of the judge.

6. The defendant Bishop testified in his own behalf, and denied that he ever saw Petrene Matson. He stated that he never saw the witness Monk but once, when the latter applied to him for treatment for a certain disease. The court excluded the evidence of what Monk applied for. When a witness has testified directly to a fact from the experience of his own senses, the extent to which he shall be allowed to testify to circumstances corroborative of the truth of what he thus has sworn must rest in the discretion of the judge who tries the case. The bearing of the fact excluded, if it had any, was most remote. *Delano v. Charities*, 138 Mass. 63, 64; *Neal v. City of Boston*, 160 Mass. 518, 522; 36 N. E. 308.

7. The dying declarations of Petrene Matson were offered by the defendant, under St. 1889, c. 100. The court found that, at the time of making them, she believed her end was near, and that her chance of recovery was slight, but that she then had some hope of recovery. Upon this finding of fact the court excluded the evidence. We are asked to reconsider both the finding and the ruling. If the declarations had been admitted, we might consider, as in other cases, whether the evidence was sufficient to warrant the findings on which the court proceeded, but we cannot revise the findings of fact. *Com. v. Coe*, 115 Mass. 481, 505; *Costelo v. Crowell*, 139 Mass. 588, 590; 2 N. E. 698. This being so, when the declarations have been rejected, even if the evidence of an unqualified expectation of death were stronger than it was in this case, we could not say that the judge was not warranted in disbelieving it. It is not argued that the defendant had a right to have the jury revise the finding of the judge. There is no doubt that the proper course is for the judge to pass upon the fact in the first instance. If the evidence is let in, our practice allows the party objecting to the evidence, who, generally, is the accused, to reargue to the jury the preliminary question as well as the truth of the declaration. But the whole purpose of the preliminary action of the judge would be lost if, in all cases, the evidence had to be laid before the jury, so as to give them the last word. If the evidence is excluded, that is an

end of the matter, unless some question of law is reserved. See *Com. v. Preece*, 140 Mass. 276, 277; 5 N. E. 494; *Com. v. Robinson*, 146 Mass. 571, 580, 581; 16 N. E. 452; *Com. v. Brewer* (Essex; Nov. 27, 1895) 42 N. E. 92. The only question for us is whether the judge was right in excluding the evidence, assuming the facts to be as found by him. It is settled that the existence of any expectation of recovery, however slight, makes dying declarations inadmissible. The finding that Matson "then had some hope of recovery" means that she thought she had some slight chance of life. Therefore, the ruling was right. *Com. v. Roberts*, 108 Mass. 296.

The foregoing are the only exceptions argued. No evidence was offered of any justification, but the defense consisted in a denial of the alleged acts.

Exceptions overruled.

Supreme Judicial Court of Massachusetts.

Filed January 3, 1896.

COMMONWEALTH v. MESKILL.

CRIMINAL LAW—COMPLAINT.

The district court, as well as the justices, has the power to receive complaints for maintaining nuisances.

Appeal from an order overruling a motion to quash the complaint on the ground that it was not made before the justices of the district court, nor addressed to such justices, or any of them.

George A. Sanderson, Dist. Atty., for the commonwealth.

Thomas Hillis, for defendant.

HOLMES, J.—The only point argued for the defendant is that the complaint should have been addressed to the justices of the district court, instead of to the district court. It would

seem that a motion to quash on this ground, made for the first time in the superior court, came too late. Pub. St. c. 214, § 25; Com. V. Walton, 11 Allen, 238; Com. v. Harvey, 111 Mass. 420. But, if the point may be taken, the answer is that the district court, as well as the justices of it, had the power to receive complaints. St. 1893, c. 396, §§ 42, 43; St. 1874, c. 315.

Exceptions overruled.

Supreme Judicial Court of Massachusetts.

Filed January 3, 1896.

COMMONWEALTH v. MESKILL.

EXCISE—SALE.

A person may be convicted of unlawfully keeping intoxicating liquor for sale without proof that he actually sold any liquor, or offered or exposed it for sale.

'Appeal from a judgment convicting defendant of unlawfully keeping intoxicating liquors for sale.

Fred N. Wier, Dist. Atty., for the commonwealth.

Thomas Hillis, for defendant.

ALLEN, J.—One may be convicted of unlawfully keeping intoxicating liquor for sale without proof that he actually sold any liquor, or offered or exposed it for sale. Com. v. Tay, 146 Mass. 146; 15 N. E. 503; Com. v. Welch, 140 Mass. 372; 5 N. E. 166; Com. v. Atkins, 136 Mass. 160; Com. v. McCue, 121 Mass. 358.

Exceptions overruled.

FED. CRIM. REP., VOL. I.—53

Supreme Judicial Court of Massachusetts.

Filed January 3, 1896.

COMMONWEALTH v. FLYNN et al.

1. EVIDENCE—ROBBERY.

Upon an indictment for robbery, it is always competent to show the effect of the assault upon the person assaulted.

2. SAME—PHYSICIAN.

A physician, who attended the person robbed for two days after the robbery, may testify that she was hysterical when he saw her.

3. SAME.

A witness, if an expert, may give a description of the appearance of the person robbed and of her apparent physical condition before and after the robbery.

4. WITNESS—CROSS EXAMINATION.

A witness, called to prove an alibi, who testified that he thought of defendant when his attention was directed to the robbery, may be asked on cross-examination, whether he then associated defendant with the robbery.

5. CRIMINAL LAW—INSTRUCTION.

A remark by the judge in his charge that the person robbed "identified them here at the trial without hesitation," was held not to be an expression of opinion in regard to the credibility of the witness.

Appeal from a judgment convicting defendants of robbery.

John D. McLaughlin, Dist. Atty., for the commonwealth.

John W. Corcoran and McDonald & Ruggles, for defendants.

KNOWLTON, J.—The evidence objected to was rightly admitted. Upon an indictment for a robbery, it is always competent to show the effect of the assault upon the person assaulted. The physician who attended Florence Meakin for two days after the robbery might well testify that she was hysterical when he saw her.

The testimony of the witness Schneider was not admitted as the opinion of an expert, but as a description of the appearance of the person robbed, and of her apparent physical condition be-

fore the robbery and after it. Com. v. Sturtivant, 117 Mass. 122, and cases cited.

The witness Kelley, having testified to facts which tended to prove an alibi for the defendant Flynn, and having said that his attention was called to the robbery on the next day after it occurred, and that he then thought of Flynn, the commonwealth, in cross-examination, for the purpose of fixing the time and testing his accuracy, was rightly permitted to ask him the question, "Did you then associate Flynn with the robbery?"

The witness Brown had testified that he was in Worcester with the defendant Dorney at the time of the robbery, and the defendants were not injured by the question put to him in cross-examination, "Miss Meakin did not identify you as the man who assaulted her?" and his answer: "No; I do not know as she saw me. I saw her. She could not have seen me if she looked."

The only other exception is to a remark of the judge in the course of his charge, referring to the testimony of Miss Meakin, as follows: "She identified them here at the trial without hesitation." It is contended that the meaning of the word "identify" is to prove identical, or to prove to be the same, and that, therefore, the remark was an expression of opinion in regard to the credibility of the witness, and not a mere statement of a part of the evidence. Pub. St. c. 153, § 5; Com. v. Foran, 110 Mass. 180. It is not disputed that she testified without hesitation to her identification of the defendants as her assailants, and we think it clear that the judge used the word "identified," in reference to her testimony, in a colloquial sense, as meaning "asserted their identity." We do not think the jury could have been misled by the remark. Moreover, when his attention was directed to it, he said to the jury: "I was then depending upon my recollection. It is for you to say what the evidence is." It was plainly his purpose to have the jury understand that they were not to consider his opinion of the credibility of the witness, if he had seemed to express it.

Exceptions overruled.

Supreme Judicial Court of Massachusetts.

January 3, 1896.

COMMONWEALTH v. CROWE.**1. EVIDENCE—ARSON.**

Upon the trial of an indictment for arson, evidence of a threat of defendant to burn the building made fourteen months before the fire, was held, under the circumstances of this case, to have been properly admitted.

2. SAME.

Upon the trial for arson, conversation and conduct of defendant, shortly after the fire, was admissible, in the discretion of the court, in connection with other evidence in the case, to show guilty knowledge on the part of defendant.

There was evidence to show that the dwelling house alleged to have been burned in the name of Margaret Mallon, a married sister of the defendant, and that the premises were purchased by the combined earnings of the defendant and other members of the family, and the title put in the name of said Mallon, prior to her marriage; that before the marriage the family occupied the lower tenement together, and rented the upper tenement, and after the marriage said Mallon and her family occupied the upper tenement, and the defendant, with his mother and brothers, remained in the lower tenement. In January, 1894, a controversy arose as to the relative interests of the several members of the family in the property. In settlement of the troubles the property was sold to one Downes, and the defendant's mother received four hundred and fifty dollars, as a result of negotiations which continued through the summer, ending in August of 1894, at which time the defendant, with his mother and brothers, moved out of the house, into a tenement a few feet away from said house, leaving Mallon in occupancy of the upper tenement; and the lower tenement was leased, which tenements were in occupancy at the time of the alleged burning. There was evi-

dence of quarrels in the family pending the negotiations through the summer, and a complaint made to the court. After the settlement was made, and the defendant moved out of the house, there was no communication between the defendant and his sister, and there was no evidence of any conflict between them. The government offered evidence to show that the defendant, fourteen months before the alleged burning, said 'that, unless his mother got something out of the property, he would burn the building,' to the admission of which the defendant objected. The court admitted the evidence, provided the government showed, as claimed, that the ill feeling which existed at the time of the threat between the defendant and his sister continued down to the time of the fire, and the government subsequently offered evidence tending to show such fact; and the defendant excepted. The government offered a conversation overheard by a police officer between the defendant and one Donahue, a brother-in-law of the defendant, which took place the next morning near the premises, in substance as follows: The defendant asked, 'Is this the place where the fire was?' Donahue answered, 'Don't you know it is?' which was followed by laughter on the part of the defendant,—to which the defendant objected. The court admitted it in evidence, and the defendant excepted. The police officer, directly after the above conversation, arrested said Donahue for drunkenness; and the government offered a certain statement of the defendant to the officer at the time of the arrest, all of which was denied by the defendant, to wit: 'You want to arrest him to find out what he knows about who set the fire.' The court admitted the evidence, and the defendant excepted.

Fred N. Wier, Dist. Atty., for the commonwealth.

Marcellus Coggan, for defendant.

LATHROP, J.—1. The evidence of the threat of the defendant to burn the building made fourteen months before the act for which he was indicted, was properly admitted. While

the threat was "that unless his mother got something out of the property he would burn the building," and while it appeared that his mother had got something out of the property, yet, as the evidence showed that there was ill feeling between the defendant and his sister at the time of the threat, and that this ill feeling continued to exist down to the time of the burning,—his sister continuing to occupy a part of the building during this time,—the evidence was competent. *Com. v. Goodwin*, 14 Gray, 55; *Com. v. Chase*, 147 Mass 597; 18 N. E. 565; *Com. v. Quinn*, 150 Mass. 401; 23 N. E. 54; *Com. v. Holmes*, 157 Mass. 233, 240; 32 N. E. 6.

2. The morning after the fire, the defendant, while near the premises, said to his brother-in-law, one Donahue, "Is this the place where the fire was?" Donahue answered, "Don't you know it is?" This was followed by laughter on the part of the defendant. All this was overheard by a police officer, who directly afterwards arrested Donahue for drunkenness. The defendant then said, "You want to arrest him to find out what he knows about who set the fire." The defendant denied that he made this last statement, and all of the evidence was excepted to. We are of opinion that the evidence had some tendency to show guilty knowledge on the part of the defendant, and was admissible, in the discretion of the court, in connection with the other evidence in the case. *Com. v. McCabe*, 163 Mass. 98; 39 N. E. 777; *Com. v. Welch*, 163 Mass. 372; 40 N. E. 103.

• Exceptions overruled.

Supreme Judicial Court of Massachusetts.

Filed January 3, 1896.

COMMONWEALTH v. CODY.

1. CRIMINAL LAW—JURY.

The court, in its discretion, may discharge a jury where it is unable to agree, and the person accused may be tried again by another jury.

2. SAME—INDICTMENT—PENDENCY.

The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause, nor is it ground for a plea in bar, nor for a motion in arrest of judgment.

3. SAME.

In an indictment under section 22, chapter 202 of Public Statutes, it is sufficient to charge that the defendant was armed with a pistol, without other allegations to show in what way it was dangerous.

4. SAME.

Where the indictment does not charge an assault with the pistol, it is unnecessary to allege how the weapon was used or intended to be used.

5. SAME—FORMER CONVICTION.

Where a count in an indictment charges defendant with being an habitual criminal, and evidence relating thereto is introduced by the government but subsequently withdrawn from the consideration of the jury, the fact that the government was allowed to go to the jury only on a prior count cannot be said, in contemplation of law, to have injured the defendant, where the jury was carefully instructed not to regard any of the evidence relating to such count.

6. SAME—PROVING EXCEPTIONS—PRESENCE OF ACCUSED.

There is no reason why the petitioner should be present at a hearing before a commissioner to prove the truth of his exceptions, unless he desires to be present, or to be heard in person or to testify in his own behalf.

7. SAME.

The court will not consider statements in the bill of exceptions which petitioner seeks to prove, where the bill alleged differs materially from that proven and is manifestly unfair.

Appeal from a judgment convicting defendant of robbery, being armed with a dangerous weapon.

M. J. Sughrue, Dist. Atty., for the commonwealth.

F. F. Sullivan, for defendant.

LATHROP, J.—This is a petition to prove exceptions. The petitioner was convicted on the first count of an indictment containing three counts, the second and third counts having been abandoned by the government at the close of the evidence, and before the case was submitted to the jury. The petitioner duly filed a bill of exceptions, which the chief justice of the superior court, who presided at the trial, disallowed, at the same time allowing a substitute bill of exceptions, if the petitioner chose to adopt it by a certain time. This substitute bill was not adopted, and the present petition was filed in this court. It was referred to a commissioner, who has made his report; and his findings are, in substance, against the petitioner. The commissioner has found that the first seven paragraphs of the petitioner's bill are true, and that they do not differ materially from those in the bill which the judge was willing to allow, except that the latter bill did not allude to the proceedings upon a new trial, and that these are correctly stated in the petitioner's bill, so far as the same are now relied upon. By the direction of the court, the questions arising on the petition to prove the exceptions, and on the exceptions, if proved, were argued together. At the request of the petitioner's counsel, we have examined the stenographer's report of the evidence, and are satisfied with the correctness of the commissioner's findings.

1. The first exception relates to a plea in bar to which the government filed a demurrer, which was sustained by the court. The plea set forth that on a previous indictment for the same offense, the petitioner was tried, and the jury, not being able to agree, were discharged, against his will and consent; that a second indictment was subsequently found for the same offense, and after this the indictment was found for which he is now on trial,

the last two indictments being in substance the same as the first, except that they contain the words "maim and." It is further alleged that the petitioner had been once placed in jeopardy, and should not have been tried again. We are of opinion that the ruling of the court below was right. It is well settled in this commonwealth that the court, in its discretion, may discharge a jury where it is unable to agree, and that the person accused may be tried again by another jury. *Com. v. Bowden*, 9 Mass. 494; *Com. v. Purchase*, 2 Pick. 521; *Com. v. Roby*, 12 Pick. 496, 503. See, also, *Com. v. Sholes*, 13 Allen, 554; *Com. v. McCormick*, 130 Mass. 61; *U. S. v. Perez*, 9 Wheat. 579; *Winsor v. Queen*, L. R. 1 Q. B. 289, 390.

The defendant, however, contends that, if he could be tried again on the first indictment, he could be tried upon the last indictment. But the pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause (*Com. v. Drew*, 3 Cush. 279); nor is it ground for a plea in bar (*Com. v. Berry*, 5 Gray, 93); nor for a motion in arrest of judgment (*Com. v. Murphy*, 11 Cush. 472).

2. The defendant also filed a motion to quash the first count of the indictment. The principal objections urged to the form of this count are that while it is charged that the accused, at the time of committing the offense, was "armed with a dangerous weapon, to wit, a pistol, with intent," etc., it is not charged that the pistol was capped, loaded with ball, powder, or cartridges, or capable of being discharged; nor that the pistol was aimed at the person named in the indictment, or discharged, or used as a firearm or club; nor does it appear that the pistol was a dangerous weapon. This count in the indictment is framed under Pub. St. c. 202, § 22, which was first enacted by St. 1818, c. 124, § 1, and has since been in force, with the exception that the punishment, which was by this statute death, was reduced by St. 1839, c. 127, to imprisonment in the state prison for life. Rev. St. c. 125, § 13; Gen. St. c. 160, § 22. Soon after the passage of St. 1818, a case arose under it, and an indictment was framed to which the one in the case at bar conforms, and under

which the prisoner was convicted and executed. *Com. v. Martin*, 17 Mass. 359. This has been a recognized form ever since. *Davis*, Prec. No. 203; *Train & H.* Prec. 461, 462; 1 *Whart. Prec.* (4th Ed.) 411, 412. It has also been used in *Com. v. Gallagher*, 6 Metc. (Mass.) 565, and in *Com. v. Mowry*, 11 Allen, 20. We have no doubt that the indictment is sufficient in form. The gist of the offense is the being armed with a dangerous weapon. *Com. v. Mowry*, *ubi supra*, where it was held not to be necessary to allege either that the assault was committed with a dangerous weapon, or that the intent to kill or maim was to be carried out, in case of resistance, by means of such dangerous weapon. The indictment does not allege an assault with a pistol; and therefore it is unnecessary to allege how the weapon was used, or intended to be used.

The remaining question is whether it is sufficient to charge that the defendant was armed with a dangerous weapon, to wit, a pistol, without other allegations to show in what way it was dangerous. We have no doubt that the indictment is sufficient in this respect. It follows a well-established precedent, and is supported by authorities. *U. S. v. Wood*, 3 Wash. C. C. 442; *Fed. Cas. No. 16,756*; *U. S. v. Wilson*, *Baldw.* 78, 99; *Fed. Cas. No. 16,730*; *Allen v. People*, 82 Ill. 610.

A further ground urged in support of the motion to quash is that the indictment is vague, indefinite, and uncertain, under article 12 of the declaration of rights. This is disposed of by the case of *Com. v. Robertson*, 162 Mass. 90; 38 N. E. 25.

3. After a verdict of guilty in the court below, the petitioner filed a motion for a new trial, on the grounds that the verdict was against the law, the evidence, and the weight of the evidence; also, on the ground that the indictment charged him with having committed two distinct offenses, and with being an habitual criminal, and because the evidence relating to the last count was introduced by the government, and then withdrawn from the consideration of the jury; that this action on the part of the government made part of its case the bad character of the defendant, and deprived him of his constitutional right in taking the initia-

tive in the introduction of evidence to prove his character. It appears from the certificate of the chief justice that the defendant elected to preserve his remedy, if he had any, before the supreme judicial court, as to the questions of law contained in his motion, and that, after a full hearing on the remainder of the motion, it was overruled. The defendant excepted to the disallowance of the motion for a new trial. Assuming that the defendant has a right now to be heard upon the questions of law raised by the motion for a new trial, we see no ground of complaint on his part. His counsel has referred us to no provision of the constitution which prevents the government from proving the necessary allegations of the indictment. The third count of the indictment was under St. 1887, c. 435, known as the "Habitual Criminal Act." This act was held to be constitutional in *Com. v. Graves*, 155 Mass. 163; 29 N. E. 579, and in *Sturtevant v. Com.*, 158 Mass. 598; 33 N. E. 648. It is necessary to charge in the indictment the former convictions and sentences of the defendant. *Com. v. Walker*, 163 Mass. 226; 39 N. E. 1014. Being charged in the indictment, it is necessary for the government, if it relies upon them, to prove them. This was the course pursued in this case. The fact that the government was allowed subsequently to go to the jury only on the first count cannot be said, in contemplation of law, to have injured the defendant. The jury were carefully instructed not to regard any of the evidence relating to the third count. *Smith v. Whitman*, 6 Allen, 562; *Costello v. Crowell*, 133 Mass. 352, 354, 355; *Anthony v. Travis*, 148 Mass. 53, 60; 19 N. E. 8; *Com. v. Thompson*, 159 Mass. 56, 59; 33 N. E. 1111.

4. It appears from the certificate of the commissioner, to whom the petition to prove the exceptions was referred by this court, that the petitioner was not present during the hearing before him; and this is relied upon as error. It does not appear that any request was made that he should be present. By Pub. St. c. 214, § 10, it is provided: "No person indicted for a felony shall be tried unless personally present during the trial." This statute is simply declaratory of the common law, and applies

only to the trial by jury. Neither the statute nor the rule of the common law has any application to proceedings which may intervene between the verdict of the jury and the sentence. In this commonwealth it has never been the practice to have a prisoner present when his exceptions are under discussion before the superior court, or when they are argued in this court; and there is no reason why he should be present at a hearing before a commissioner to prove the truth of his exceptions, unless he desires to be present, or to be heard in person, or to testify in his own behalf. See *Com. v. Costello*, 121 Mass. 371; *Com. v. McCarthy*, 163 Mass. 458; 40 N. E. 766.

5. As to the other statements in the bill of exceptions which the petitioner seeks to prove, it now appears that exceptions were alleged to be saved where none were taken at the trial, important qualifying statements were omitted where exceptions were taken, and the bill alleged differs so materially from that proven, and is so manifestly unfair, that we are not called upon to consider the matter further. See *Sawyer v. Iron Works*, 116 Mass. 424; *Morse v. Woodworth*, 155 Mass. 233; 27 N. E. 1010, and 29 N. E. 525.

Exceptions overruled.

Supreme Court of Ohio.

Filed November 26, 1895.

BURDGE v. STATE.

1. FORGERY—INDICTMENT.

In an indictment for forgery of a promissory note, the omission, in setting it out according to its "purport and value" (Rev. St. § 7218), of a power of attorney to confess judgment, attached to the note, is not a variance material to the merits of the case, nor prejudicial to the defendant, and, therefore, not a ground of acquittal. *Id.* § 7216.

2. SAME—EVIDENCE.

Where a party is indicted for the forgery of a note, evidence that the defendant released a judgment he had taken on the note, without consideration, after being charged with the forgery, is competent on the question of his guilt.

3. CRIMINAL LAW—CONFESSIONS.

Where confessions of the defendant are offered in evidence on a criminal prosecution, and it is claimed that they were not voluntary, the preliminary proof as to whether they were obtained by the influence of hope or fear may, if the evidence is conflicting, be submitted by the court to the jury, under instructions to disregard the evidence, if satisfied that the confessions were involuntary.

Appeal from a judgment convicting plaintiff in error of forgery.

J. F. McNeal & Son and T. E. Powell, for plaintiff in error.

Grant E. Mouser, for the state.

MINSHALL, C. J.—The plaintiff in error, Marshall S. Burdge, was, on the charge of forgery, indicted by the grand jury of Marion county, and tried, convicted and sentenced to imprisonment in the penitentiary. He claims that various errors to his prejudice were committed in the trial of the case by the court below, and asks that the conviction and sentence be reversed, and a new trial awarded him.

The principal assignment of error relied on is that there is a variance between the indictment and the evidence offered in support of it. The indictment charges that he did falsely make, alter, and forge a certain promissory note for the payment of money "of the purport and value" as follows: "\$3,100.00. Lu Rue, O., August 21, 1886. Eleven months after date, for value received, we jointly and severally promise to pay M. S. Burdge, on order, thirty-one hundred dollars, with interest payable annually at the rate of eight per cent. per annum from date until paid. E. Gillespie." The instrument offered in evidence was a promissory note for the payment of money, not only of the purport and value of that set forth in the indictment, but identical with it in all respects except that it had thereto attached a

power of attorney, in the usual form, to confess judgment upon it; and there were also indorsed, on the back of it, certain payments of interest amounting to about \$500. The note and power of attorney were over the same signature. The rules as to a variance between an indictment and the proof offered to support it have been much relaxed by statute, not only in this state, but elsewhere. In the first place, it is no longer necessary to set forth the instrument alleged to have been forged with literal accuracy. It is sufficient if it be set forth according to its "purport and value." Rev. St. § 7218. The word "value," as here used, does not mean its value in money as between the parties, but its value or effect in law, as a legal instrument. *Chidester v. State*, 25 Ohio St. 439. The rules of the common law as to the effect of a variance seemed rather to facilitate the escape of the guilty than to protect the innocent as they were designed to do. Hence it is now provided by statute, among other things, that when, on the trial of an indictment, there appears a variance between the indictment and the evidence "in the name or description of any matter or thing therein named or described, such variance shall not be deemed ground for an acquittal of the defendant, unless the court before which the trial is had find that such variance is material to the merits of the case, or may be prejudicial to the defendant." This preserves to the defendant all that he is entitled to on the ground of a variance, without in any way imperiling the rights of the innocent. The court must determine, in the first instance, whether the variance, if there is one, is material to the merits of the case, or may be prejudicial to the defendant. We must presume that the court did so, and held the variance, if one, to be neither material to the merits nor prejudicial to the defendant, in admitting the instrument in evidence. It is true that its action in this regard may be reviewed on error. *Lytle v. State*, 31 Ohio St. 196. But, as to a variance, it may be well questioned whether, by the rules of the common law, there was any shown between the indictment and the proof. The instrument averred to have been forged was a promissory note for the payment of money. The instrument offered and received in evi-

dence was such an instrument, and as to it there was no variance. The fact that it had a power of attorney attached did not affect its value as a promissory note; nor did the fact that there were payments indorsed on it affect its legal value or effect in this regard. *Osborn v. Hawley*, 19 Ohio St. 130; *Wilson v. People*, 5 Parker, Cr. R. 178. All that can be claimed is that, on the same paper and under the same signature, there were two instruments,—one a promissory note, and the other a power of attorney,—both distinct in character, and as much so as if they had been on separate pieces of paper. The forgery was of the promissory note, and not of the power of attorney; and as, in this case, the forgery consisted in the alteration of a valid note, without any alteration by the forger in the power of attorney, it would seem that the indictment conformed to the facts as developed by the proof, and is open to no objection on the ground of a variance, if we were to apply the stricter rules that formerly prevailed. *East*, P. C. 925.

But if it were otherwise, still was there any abuse of its discretion by the court, in admitting the instrument in evidence? This must depend on whether it was material to the merits of the case, or prejudicial to the rights of the defendant. A variance could only be material to the merits where the instrument offered in evidence tended to prove a different subject of forgery. So that the only question that remains on this point is whether it would in any way prejudice the defendant. And we do not see how this could be the case unless, as claimed, it would impair the rights of the defendant to plead a former conviction, if he should be indicted again for the same offense. This claim, we think, cannot be maintained. If, as shown, the instrument offered in evidence was not a variance from the indictment, and therefore sufficient to support it, the record of the conviction on that indictment would certainly be sufficient to support a plea of former conviction in a prosecution on a second indictment, setting forth the instrument forged to be of the same purport and value as that contained in the record of the conviction on the first indictment. And if, in the second indictment, the instrument should be set

forth with the power of attorney attached and the payments indorsed on the back, and a question were made as to the identity of the former conviction with the latter prosecution, the doubt could be removed by parol evidence that the instrument offered on the former trial is identical with that offered in support of the plea; it being well settled that parol evidence is competent for such purpose. *Reg. v. Bird*, 2 Eng. Law & Eq. 439; *Bish. Cr. Proc.* § 816; *State v. Maxwell*, 51 Iowa, 314; 1 N. W. 666; *Dunn v. State*, 70 Ind. 47; *Walter v. State*, 105 Ind. 589, 593; 5 N. E. 735; 3 Rice, Ev. 615.

2. It is also claimed that the court erred in the admission of certain testimony. The defendant below took judgment on the note for the amount due, under the power of attorney, in the court of common pleas of Lawrence county. After the commencement of the prosecution he executed a release and satisfaction of the judgment. The state offered evidence of these facts, and that the satisfaction was entered without any consideration. Objection was made, which was overruled, and exception taken. The defendant then offered evidence to show that the release was not a voluntary act on his part; that it was obtained from him, during the pendency of the criminal prosecution, by representations and statements as to what the consequences would be if he did not execute it, and that the prosecution would be dropped if he did. He was not in custody at the time, and the person obtaining the release had no control over his person or the prosecution. The court left the matter to the jury, with the instruction that, "if it appear by the evidence that the defendant released and declared satisfied said judgment, and was induced to do so by threats of criminal prosecution, or by promises to withhold criminal prosecution against him, such act, if thus done under the influence of hope or fear, cannot be considered by the jury for any purpose whatever." If the release was a voluntary act, the fact that it was without consideration was competent evidence in the case. Judgments for such amounts are not ordinarily released without consideration. The release, in connection with the facts in the case, tended to show a consciousness

that the judgment was wrong, and that the danger of a conviction of forgery might be avoided by its release. The claim of the plaintiff in error, however, is that the circumstance under which the release was obtained was a matter of preliminary proof to be determined by the court, and should not have been admitted in evidence until it had determined whether the release was the voluntary act of the defendant. The general rule is that matters preliminary to the admission of evidence should be determined by the court; but when the court is in doubt about the matter, it may submit the questions arising upon the proof to the jury, under instruction to make no use of the evidence unless satisfied by the preliminary proof that it is competent, as done in this case. Thus, in *Turpin v. State*, 19 Ohio St. 540, which arose on an indictment for forgery, the court, being uncertain, left to the jury the question whether there was a variance between the name to the instrument as laid in the indictment and that to the instrument offered in evidence, and this court sustained the ruling. The ruling made in the case just cited is quite general in practice; and has frequently been applied where confessions of a defendant are offered in evidence against him on a criminal charge, and there is a conflict in the evidence as to whether they were voluntary or not. See opinion by Morton, J., in *Com. v. Piper*, 120 Mass. 185, 188; and also *Underh. Ev.* § 89, and authorities cited.

We have examined all the assignments, and find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Supreme Court of Indiana.

Filed January 10, 1896.

NAANES v. STATE.

1. CRIMINAL LAW—INDICTMENT—DUPLICITY.

An indictment cannot be assailed for the first time on appeal upon the ground of duplicity.

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2. SAME—BILL OF EXCEPTIONS.

The only mode of making affidavits filed to sustain alleged grounds for a new trial a part of the record in a criminal case, is to embody them in a bill of exceptions.

3. EVIDENCE—DOCUMENTARY.

A copy of a hospital record, not authenticated in compliance with the requirements of section 466 R. S. 1894, is incompetent to show admission into such institution and symptoms of insanity.

4. SAME.

Proceedings of an examination by a commission as to the sanity of defendant, under section 3110 R. S. 1894, though duly certified and filed, are not evidence in a criminal prosecution.

Appeal from a judgment convicting defendant of grand larceny.

Willard & Robertson, for appellant.

W. A. Ketcham, Atty. Gen., and Chas. S. Wiltsie, Pros. Atty., for the state.

JORDAN, J.—Appellant, over her plea of not guilty, and a special one, pleading insanity, was convicted upon the charge of grand larceny, and her punishment assessed by a jury at a fine of one dollar and imprisonment in the reform school for women and girls for a period of two years. A motion for a new trial was overruled, and the court rendered its judgment in accordance with the verdict of the jury.

The errors assigned are: (1) "That the indictment upon which the appellant was convicted was bad for duplicity;" (2) that the court erred in striking out the affidavit of David S. Leach, filed in support of the motion for a new trial: (3) that the court erred in overruling the motion for a new trial.

The first error assigned presents no question for our consideration, as an indictment cannot be assailed for the first time in this court upon the ground of duplicity. There is no contention that the indictment does not charge a public offense, or one over which the lower court had no jurisdiction. *Russell v. State* (Nov. term, 1894), 40 N. E. 666.

The second assignment must also be dismissed without consideration, for the reason that the affidavit of the affiant which is alleged to have been stricken from the files has not been incorporated into the record by a bill of exceptions. The only reference to it which appears in the bill is the following: "Hitherto inserted in the record. See line one, page thirteen and one-half of this manuscript." The fact that the affidavit was filed does not alone serve to make it a part of the record, so as to present any question upon an appeal to this court. The requisite mode, and, in fact, the only one, recognized for making affidavits filed to sustain alleged grounds for a new trial a part of the record in a criminal cause, is to embody them in a bill of exceptions. *Leverich v. State*, 105 Ind. 277; 4 N. E. 852; *Meredith v. State*, 122 Ind. 514; 24 N. E. 161; *Townsend v. State*, 132 Ind. 315; 31 N. E. 797. In *Reed v. State* (Nov. term, 1894) 40 N. E. 525, in considering the question, we inadvertently used the words "or order of court," from which it might possibly be inferred that this court intended to hold that an order of court in a criminal action would serve the same purpose in bringing affidavits into the record as does a bill of exceptions; the writer of the opinion in that appeal having in mind at the time the provisions of our Civil Code (section 662, Rev. St. 1894; section 650, Rev. St. 1881), which have no application to criminal procedure, but relate exclusively to civil cases. The affidavit in question not being embraced in a bill of exceptions, this court has no legitimate means of knowing its character or contents, or for what purpose it was intended; and consequently we must presume in favor of the action of the trial court.

The affidavit of Dr. J. M. Jones filed to establish the newly-discovered evidence relied upon by the appellant, as one of the reasons for a new trial, is not properly embraced in any bill of exceptions, being simply referred in like manner as was the one previously considered, and, for the same reason, is not available to appellant in her appeal to this court.

Counsel next complain of the action of the court in refusing to admit in evidence what purported to be a copy of the register

of the Central Indiana Hospital for the Insane, which, as is stated, was offered to show that the mother of appellant had been admitted as a patient into that institution, and also the symptoms of her insanity. This paper was sworn to by George F. Edenharter, superintendent of the asylum, and it is therein stated by him that the same "is a true copy of the records as they appear at said institution." By section 3040, Rev. St. 1894, it is provided that the board of trustees of such institution shall require the superintendent to cause to be kept a hospital register, showing the date of admission of patients, etc. Under section 466, Rev. St. 1894 (section 462, Rev. St. 1881), copies of a record, book, or parts thereof, required by law to be kept in any public office in this state, are admissible in evidence when verified by a proper certificate of the custodian of such records or books as being true and complete copies of the records, books, or parts thereof in his custody, to which certificate must be annexed the seal of his office. In the event there is no official seal, then the statute requires the certificate of the clerk of the circuit court or superior court, attested by the seal thereof, to establish that the attestation of the copy of the record has been made by the proper officer. It is manifest that the attempt to authenticate the copy of the hospital record in controversy did not substantially comply with the requirements of the statute, and, for that reason alone, the evidence offered by appellant was not admissible, and the same was rightfully excluded. It was, to say the least, fatally insufficient in not certifying that the copy "is a true and complete one of the record" in his custody, and hence did not satisfy the provisions of the written law. *Tull v. David*, 27 Ind. 377; *Weston v. Lumley*, 33 Ind. 486; *Board v. May*, 67 Ind. 562; *Painter v. Hall*, 75 Ind. 208; *Board v. Hammond*, 83 Ind. 453.

At the trial, the court, over the objections of appellant, permitted the state to introduce in evidence the proceedings of an examination by a commission as to the sanity of the appellant on October 30, 1894 (being but a short time prior to the trial), before Justices Daniels and Habich, of Marion county, Ind., under section 3210, Rev. St. 1894 (section 2843, Rev. St. 1881).

These proceedings were duly certified and filed with the clerk of the Marion circuit court, and we must presume that they were necessarily instituted for the purpose of determining if she was a proper subject to be admitted as a patient into the hospital for the insane. These consisted of the statement required by the statute and the sworn evidence of Drs. Kahlo and Maxwell, and the finding thereon of the two justices of the peace. Dr. Maxwell stated, as his evidence, embodied in the proceedings, shows, that in his opinion the appellant was not insane; that "at times she feigned insanity, to escape criminal prosecution." Upon the evidence thus deduced before them, and upon an examination by them, as they state, the justices made a finding that the appellant was of sound mind. This record was offered by the state, and permitted by the court to go to the jury, for the purpose of showing that the appellant was sane at the time she committed the alleged larceny, to wit, October 24, 1894, and thereby rebutting the testimony introduced by her upon the trial upon the question of her insanity. There is evidence in the case in behalf of the appellant tending to show that her alleged insanity had existed for several years prior to the commission of the crime with which she was charged. Her counsel insists that the action of the trial court in admitting in evidence these proceedings was clearly erroneous, and prejudicial to the rights of the appellant. With this contention, under the circumstances in the case, we are constrained to concur. In *Goodwin v. State*, 96 Ind. 550, on page 564 of the opinion, this court, by Elliott, J., in referring to this kind of evidence, said: "It is maintained with much force in *Leggate v. Clark*, 111 Mass. 308, that the evidence is incompetent, and we are not prepared to say this is not the correct rule. The statute did not intend to do more than provide a method of procedure limited and restrained to a single purpose, and there is much reason for declaring that the judgment of the commission is not evidence in a civil or criminal prosecution. It is a very different thing from an inquisition of lunacy, for in such a proceeding the status of the party is fixed as to all the world, while the statutory inquiry by the justices is restricted to one specific

purpose." This commission is the creature of the statute, and is only intended by the latter to determine whether the person alleged to be insane is a proper subject to be admitted as a patient, for treatment, into the hospital for the insane. It is extrajudicial, and is not intended as is the judicial proceeding in rem for the appointment of a guardian for the person and property of a lunatic,—to fix the status of the person over whom the inquisition is held. Upon the appellant's special plea, whereby she interposed her alleged insanity as a defense, the question thereunder for the jury to determine from the evidence was: Did she have mental capacity sufficient, under the law, at the time she committed the alleged offense, to render her subject to the penalties of the statute which she was charged by the state with having violated? In the case of *Leggate v. Clark*, *supra*, the court, in considering the question, said: "A man may be a proper subject for the treatment and custody of a lunatic hospital, and yet have sufficient mental capacity to make a will, enter into a contract, and to transact business, and be a witness. *Kendall v. May*, 10 Allen, 59." It may, in reason, also be said that a person found upon the inquiry of a commission not to be a fit subject for admission as a patient, for treatment, into an insane asylum, may, nevertheless, be of such mental unsoundness as to have immunity from punishment for crime. The proceedings of this commission and the examination of the witnesses were matters with which appellant had nothing to do, and in no sense was she a party thereto. If the evidence of the witnesses as recorded in the proceedings of the commission, and whom she had no opportunity to cross-examine, should be held to be admissible against her upon this criminal charge, it would manifestly result in a denial of her right, upon her trial, under the constitution, to meet witnesses adverse to her "face to face." The evidence of Dr. Maxwell, before the commission, and which was read in evidence to the jury, was, as we have seen, to the effect that she was sane, and that she only feigned insanity in order to escape a criminal prosecution. That this may have exerted, against appellant, a controlling influence over the jury,

cannot be successfully controverted. With equal propriety might the state have obtained and read in evidence to the jury, over appellant's objections, the affidavit of the witness embracing the same statements. Without further considering the question, and thereby extending this opinion, we must and do hold that these proceedings were not admissible for the purpose for which they were introduced by the state, and that the court erred in not excluding this evidence, for which error the judgment is reversed, and the cause remanded, with instructions to the trial court to grant appellant a new trial. A mandate is hereby award for the return of the prisoner to the custody of the sheriff of Marion county, which the clerk is directed to issue accordingly.

Supreme Court of Alabama.

December 18, 1895.

BROWN v. STATE.

1. ADULTERY—SECTION 4012.

Section 4012 of the Criminal Code is directed against a state or condition of cohabitation which the parties intend to continue so long as they may choose, as distinguished from a single act or occasional acts of illicit sexual intercourse.

2. SAME—EVIDENCE.

Such offense is but seldom, in its entirety, capable of direct positive proof, but it is generally to be inferred from facts and circumstances leading to it as a necessary conclusion.

3. SAME—SIMILAR ACTS.

When it is material to show the intent with which the particular act or acts charged was done, evidence of another similar act or other similar acts, though in itself or of themselves, constituting a criminal offense, may be given.

4. SAME.

On the trial of an indictment for adultery, it is admissible to show that, subsequent to the finding of the indictment, the parties were living in adultery, if the time intervening was not of such length as to repel all reasonable inference that there was between the two conditions continuity or connection.

5. SAME—INSTRUCTION.

An instruction that, if the defendant and the woman agreed to go to Mobile county and there live in adultery, and in pursuance of the agreement they did go to Mobile and live in that condition, there can be a conviction in the county of the agreement, is erroneous.

6. SAME.

A refusal to charge that "before the jury can convict the defendant they must be satisfied, to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and important to his own interest, then they must find the defendant not guilty," is error.

Appeal from a judgment convicting defendant of adultery.

The state introduced as a witness one Wakine Pose, who testified that he knew the defendant and Caroline Barado and Phillip Barado, who was the husband of Caroline Barado. This witness was asked, "Do you know the time Caroline Barado left in the boat?" The defendant objected to this question, because it called for immaterial and irrelevant evidence. The court overruled the objection, and the defendant duly excepted. In answer to that question, the witness stated that he knew when Caroline Barado left in the boat; that the defendant and Caroline Barado went from his wharf in Baldwin county, Ala., in defendant's boat, in the summer of 1895, going in the direction of Mobile, Ala. The defendant moved to exclude this testimony, on the ground that it was immaterial, irrelevant, and inadmissible, and duly excepted to the court's overruling his motion. The state introduced as a witness one Frank Grass, who, upon being told by the solicitor to tell what he knew about the case, testified as follows: "Mrs. Caroline Barado came to witness' house at Point Clear, Baldwin county, Ala., and in about five minutes thereafter defendant came in, and said to Caroline, 'Let's go.' That said Caroline replied,

'I don't know what I am going to do.' That defendant then asked witness to take said Caroline on the beach, and that witness replied, 'No, sir; I don't want any trouble in my house.' That said Caroline then sent one Fred, known as 'Dutch Charlie,' on the beach to see if he could see Phillip Barado, and that said Fred came back and said 'No.' That defendant then said to Caroline, 'Let's go now; we have a fair wind.' That witness did not see Caroline Barado and defendant again before he saw them in court on trial for this cause." The defendant objected to the testimony of this witness, and moved to exclude it from the jury, on the ground that it was immaterial, irrelevant, and inadmissible. The court overruled the objection and motion, and to this ruling the defendant duly excepted. James W. O'Neil, as a witness for the state, testified as follows: That he knew the defendant and Caroline Barado; that he saw the defendant and Caroline Barado and her two children at the wharf at Daphne, Baldwin county, Ala., late in the afternoon, and there was a heavy squall coming up, and that the witness said to defendant, "Mrs. Barado had better stop at my house," to which the defendant replied that he had a comfortable cabin on the boat, and could keep her comfortable in there. That witness looked out early the next morning towards the wharf to see if he could see anything of the defendant and Mrs. Barado, and that he saw the boat of defendant lying at anchor a short distance from the wharf, and in the cabin he saw the heads of four persons, a man, a woman, and, apparently, two children. The defendant moved to exclude this testimony from the jury, on the ground that it was immaterial, irrelevant, incompetent, and inadmissible. The court overruled the motion, and the defendant duly excepted. The state introduced the showing as to what the sheriff of Mobile county and one of his deputies would testify if present at the trial. The testimony set out in said showing was as follows: "That on September 26, 1895, they arrested Caroline Barado and Nicholas Brown under a warrant issued by the judge of the county court of Baldwin county, Ala., under a complaint charging them with living together in adultery. That they arrested Caroline Barado at

a house on Little Dauphin Island, Mobile county, Ala., while she was cooking breakfast at the house where Nicholas Brown resided. That said house had only one bed in it, which was a double bed, and had two pillows on it. That they arrested Nicholas Brown where he was fishing in the neighborhood of said house in said county. That said Caroline Barado and said Nicholas Brown, on being permitted to get some clothing to take with them before leaving the place, each took clothing, including underclothing, from the same box under the bed in said house. That when the witnesses went to said house and arrested said Caroline Barado there was a woman's nightgown on or near the bed above described." The defendant objected to each separate portion of the testimony of these witnesses, as contained in the showing, and the whole of the testimony, as stated therein, and moved to exclude the testimony on the ground that such testimony was irrelevant, incompetent, and inadmissible. The court overruled each separate objection and motion, and to each ruling the defendant separately excepted. This was all the evidence introduced by the state, and the defendant moved the court to exclude all of such evidence, which motion the court overruled, and the defendant excepted. Thereupon the defendant moved the court to discharge him. The court overruled this motion, and the defendant duly excepted. The defendant introduced evidence tending to show that he was not guilty as charged in the indictment; that he had been employed by Phillip Barado, the husband of Caroline Barado, and that, when he left the employment, Caroline Barado requested him to take her and her two children to Mobile, which the defendant did; that afterwards, at the request of said Caroline Barado, he took her to Little Dauphin Island, in Mobile county, Ala., where she was employed by the defendant to cook, clean up defendant's house, and wash for him. In the court's general charge to the jury, among other things, he instructed them as follows: "If the defendant and Caroline Barado agreed in this county to go to Mobile county, Ala., and live in the state of adultery, and went off from Point Clear under the circumstances described by the witnesses in this case, and

then went together to Mobile county, and lived in the state of adultery, and such living together was a consummation of the previous agreement, he would be guilty." To this portion of the court's general charge the defendant fully excepted. The defendant requested the court to give to the jury the following written charge, and duly excepted to the court's refusal to give the same: (a) "The court charges the jury that before the jury can convict the defendant they must be satisfied, to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion; and unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and importance to his own interest, then they must find the defendant not guilty."

Chas. L. Bromberg, Jr., for appellant.

Wm. C. Fitts, Atty. Gen., for the state.

BRICKELL, C. J.—Adultery, "the voluntary sexual intercourse of a married person with one not the husband or wife," is not the offense, but an element or constituent of the offense, the statute renders indictable. Cr. Code, § 4012. As has been often explained, the statute is directed against a state or condition of cohabitation the parties intend to continue so long as they may chose, as distinguished from a single act or occasional acts of illicit sexual intercourse. This state or condition may well be assumed in a single day, if the parties so design, as any other state or condition may be so assumed. If for a single day they live together in adultery, intending a continuance of the connection, the offense is committed, though the cohabitation may be broken off or interrupted from any cause whatever. *Hall v. State*, 53 Ala. 463; *Lawson v. State*, 20 Ala. 65; *Collins v. State*, 14 Ala. 608; *State v. Glaze*, 9 Ala. 283. It is but seldom the offense, in its entirety, is capable of direct, positive proof. It is generally to be inferred from facts and circumstances leading to it as a necessary conclusion. In *Lawson v. State*, supra, it was said by Goldth-

waite, J.: "The fact of illicit intercourse is one which, from its nature, can very rarely be directly proved, and must in the very great majority of cases be inferred from circumstances, the weight and conclusiveness of which vary according to the situation of the parties, the habits of society and other incidental circumstances. Facts, apparently trivial and innocent in themselves, sometimes derive importance from their connection and combination with other facts." The fact that the defendant and the woman, with her two children, came to Baldwin county together, in the boat of the defendant; that she went to the house of Grass, and that a few minutes after her arrival the defendant went to the house, and the conversation there occurring between them; the request made by the defendant of Grass to take the woman to the beach, and his response; the sending out on the beach to see if the husband of the woman could be seen, and, when it was ascertained that he could not, their departure for the boat of defendant, and leaving in the boat with the two children; the proposal of O'Neil that the woman should stop at his house; the answer of defendant, in her presence, that there was a cabin on the boat in which she could be comfortable; that on the next morning the boat was at anchor a short distance from the wharf, and in the cabin there were apparent the heads of four persons, a man, a woman, and two children; the manner and condition in which the defendant and the woman were living, and their conduct when arrested in Mobile to answer the accusation,—were facts and circumstances not without relevancy, and proper for the consideration of the jury in determining whether the state and condition to which the statute is directed had been assumed. Their sufficiency—their weight and conclusiveness—it was the province of the jury to determine, under proper instructions from the court. The immediate tendency of the evidence touching the condition in which the parties were living, and their conduct when arrested in Mobile, was to show unlawful cohabitation in Mobile,—a distinct, substantive offense, independent of that charged in the accusation, and yet not inconsistent with or negating that charge; for it may well be that, at different periods of time, the

relation or condition to which the statute refers may exist in two or more counties. It is true, as is insisted in the argument of counsel, that the general principal is that evidence of a distinct, substantive offense is not admissible in support of another offense. The rule has its exceptions, and of these a recognized exception is that, when it is material to show the intent with which the particular act or acts charged was done, evidence of another similar act, or other similar acts, though in itself, or of themselves, constituting a criminal offense, may be given. *Gassenheimer v. State*, 52 Ala. 313. The state and condition in which the parties were living in Mobile, it is apparent, was assumed in but a brief space of time after the occurrence of the circumstances in Baldwin county. If, subsequent to these occurrences, the parties are found living in the state and condition they indicate, an inference may arise that, though there was a change of locality, the state and condition was continuous. In *Com. v. Nichols*, 114 Mass. 285, it was ruled that acts of adultery between the defendant and the same woman, near the time of the adultery for which he was indicted, though committed in another county, were proper to be proved in support of the indictment. In *Lawson v. State*, supra, it was held admissible to show that, subsequent to the finding of the indictment, the parties were living in adultery, if the time intervening was not of such length as to repel all reasonable inference that there was between the two conditions continuity or connection. We find no error in the rulings of the court below as to the admissibility of evidence.

The substance of the instruction to the jury to which an exception was reserved is that if the defendant and the woman agreed to go to Mobile county and there live in adultery, and in pursuance of the agreement they did go to Mobile county and live in that condition, there could be a conviction under the accusation. As we gather from the argument of counsel the instruction was supposed to be authorized by the statute (Cr. Code, § 3719), which declares that "when an offense is committed partly in one county and partly in another, or the acts, or effects thereof, constituting, or requisite to the consummation of the

offense, occur in two or more counties, the jurisdiction is in either county." It was a rule of the common law that when an offense was constituted by a series of acts, a part of which were done in one county and a part of another, there could be no prosecution in either, unless so much was done in the one as would constitute a complete offense. 1 Bish. Cr. Proc. § 54. Examples of the application of the rule will be found in 1 Chit. Cr. Law, 177; 5 Bac. Abr. tit. "Indictment," subd. 2. The controlling purpose of the present statute was the abrogation of the rule of the common law. A single, indivisible offense, not consisting of several parts, is not within the operation of the statute. If there was no more in Baldwin county than the agreement of the parties to live in adultery in Mobile county, however immoral the agreement was, an indictable offense was not committed. *Miles v. State*, 58 Ala. 390; *Shannon v. Com.* 14 Pa. St. 226; *Smith v. Com.*, 54 Pa. St. 209. The offense the statute denounces may have been contemplated, but it rested in contemplation merely. There was not, and could not be elsewhere than in Mobile county, an attempt to commit it. An attempt to commit a crime may be indictable; but the mere intent to commit it, unaccompanied by any act in furtherance of the intent, cannot be matter of indictment. The living together in adultery, the state and condition against which the statute is directed, in its nature and essence, is a single, indivisible offense, which cannot be severed. It commences when the state or condition is assumed, and not until it is assumed; and it is indictable only when and where the state or condition is actually and intentionally entered upon and assumed. There was error in the giving of this instruction. The instruction requested by the defendant was extracted literally from an instruction which was declared at the last term to assert a correct legal proposition. *Burton v. State* (Ala.), 18 South. 284. When analyzed and interpreted, the instruction means no more than that the guilt of the accused must be fully proved,—as it is usually expressed, proved beyond a reasonable doubt,—and that this degree of proof is not reached unless all reasonable supposition of innocence is excluded. When, in its present form,

the instruction may be given, the court, ex mero motu, if apprehensive that it may unduly influence the jury, or that it may mislead them, has the power, and it may become a duty, to explain its true interpretation and meaning. *McKleroy v. State*, 77 Ala. 95. For the errors pointed out the judgment must be reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law.

Supreme Court of Alabama.

December 18, 1895.

HOWARD v. STATE.

1. JURY—WAIVER.

Irregularity in the organization or empanelling of a petit jury is waived, if objection is not made before entering on the trial.

2. INDICTMENT—DUPLICITY.

Where several offenses are of the same general nature and belong to the same family of crimes, and the mode of trial and nature and degree of punishment are the same, they may be joined or included in different counts of the same indictment.

3. SAME—ELECTION.

The court should never interfere, either by quashing the indictment or by compelling an election when the joinder is simply designed and calculated to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction.

4. EVIDENCE—MATERIAL.

Upon trial for sheep stealing, evidence of a witness that he had seen several sheep of the prosecutor with the marks changed to the mark of the defendant, is not subject to any just objection.

5. TRIAL—WITHDRAWING CASE.

The court should not withdraw the case from the consideration of the jury, because the facts and circumstances, when dis severed and disconnected, are weak and inconclusive, if their probative forces when combined may be sufficient to satisfy the jury of the guilt of the defendant.

6. CRIMINAL LAW—INSTRUCTION.

There is no prescribed formula, under certain confidential method, which must be observed in framing instructions to a jury.

7. SAME.

It is essential that the language in which they are expressed is not ambiguous, but is fair, accurate and otherwise in its meaning; and an instruction which has a tendency to mislead or to confuse the jury, if not explained so as to free it of this tendency, may be properly refused.

8. SAME—REASONABLE DOUBT.

Where the acts of the accused as developed in the evidence are explainable upon a reasonable hypothesis consistent with his innocence, there is reasonable doubt of his guilt, entitling him to an acquittal.

Appeal from a judgment convicting defendant of stealing a sheep.

The appellant was tried under the following indictment: "The grand jury of said county charge that, before the finding of this indictment, Francis A. Howard feloniously took and carried away one sheep, the personal property of William G. Pringle. The grand jury of said county charge that, before the finding of this indictment, Francis A. Howard, with intent to defraud, did mark or brand an unmarked sheep, or did alter or deface the mark or brand of such animal, the property of William G. Pringle,—against the peace and dignity of the state of Alabama." On the trial of the cause, as is shown by the bill of exceptions, the state introduced as a witness W. G. Pringle, who testified that he saw the defendant driving a flock of sheep, in which were some belonging to witness, some to the defendant, and some to other

persons. The defendant then moved the court to require the state to elect on which count in the indictment it would proceed, whether for the larceny of the sheep, or for the alteration of the mark of a sheep. The court refused this motion, and the defendant duly excepted. Darby Odom, a witness for the state, testified that he had seen a sheep which belonged to W. G. Pringle feeding with other sheep near the house of the defendant, and that the mark of this sheep had been changed from Pringle's mark to the defendant's mark. He identified the sheep on account of its unusual appearance and peculiar spots. J. H. Stokes, one of the witnesses for the plaintiff, upon being asked if he had seen any of Pringle's sheep whose mark had been changed to the defendant's mark, testified "that he had seen several of Pringle's sheep whose mark had been changed from Pringle's mark to the defendant's." The defendant objected to the witness being allowed to testify as to the change of the mark of more than one sheep, or of any other sheep than the one for which the defendant was being prosecuted, and moved to exclude this testimony of the witness Stokes. The court overruled the objection and motion, and to this ruling the defendant duly excepted. The defendant, as a witness in his own behalf, testified that he had never stolen or taken away any sheep belonging to W. G. Pringle, or changed the mark of any sheep belonging to him; that he did not remember the circumstances mentioned by the witness Pringle, but that it was quite common for the sheep of different persons to mingle in the same flock when being herded or driven, since the sheep of different persons in the same neighborhood used the same range. This being substantially all the evidence, the defendant moved the court to exclude all of the testimony for the state. The court overruled this motion, and the defendant duly excepted to such ruling. The defendant then moved that the state be required to elect on which count in the indictment it would proceed, and the solicitor thereupon elected to proceed on the first count, for the larceny of the sheep which had been described by the witness Odom. The defendant requested the court to give to the jury the following written charges,

and separately excepted to the court's refusal to give each of them as asked: (H) "The court charges the jury that if they believe the evidence in this case, they must find the defendant not guilty." (E) "The jury must find the defendant not guilty if the conduct of said defendant, upon a reasonable hypothesis, is consistent with innocence." (1) "The court charges the jury that if they believe, from the evidence, that there is any likelihood of the defendant's innocence, they should acquit him." (2) "The court charges the jury that if the evidence satisfies them that it is merely likely that the defendant is guilty, they should acquit him." (4) "The court charges the jury that a mere likelihood of the defendant's innocence, founded on the evidence, is sufficient for his acquittal."

Clarke & Webb, for appellant.

Wm. C. Fitts, Atty. Gen., for the state.

BRICKELL, C. J.—1. Irregularity in the organization or impanelling of a petit jury is waived, if objection because of it is not made before entering on the trial. If first presented on error, as in the present case, as cause for the reversal of a judgment of conviction, it comes too late. It is not necessary, therefore, to decide whether, in the organization of the petit jury, in the events which had occurred, there was regularity or irregularity. 1 Thomp. Trials, § 113.

2. Larceny of any one of the domestic animals enumerated in the statute, or the marking or branding of them with intent to defraud, or altering or defacing a mark or brand, is a felony. Cr. Code, §§ 3789-3831. The several offenses are of the same general nature, and belong to the same family of crimes, and the mode of trial, and nature and degree of punishment, are the same. Joining or including them in different counts of the same indictment is sanctioned by the rules of the common law as it prevails in this state, and by long usage. 1 Brick. Dig. p. 500, §§ 750, 751; 3 Brick. Dig. p. 281, § 474. The theory on which the joinder proceeds is that each count alleges a distinct, substan-

tive offense; but, in practice, it is generally intended to meet the different phases in which the evidence may present the same offense. *Adams v. State*, 55 Ala. 143; *Orr v. State* (Ala.) 13 South. 142.

3. In *Mayo v. State*, 30 Ala. 32, it was said: "When two distinct felonies are charged in different counts, it is not a matter of legal right, pertaining to the accused, that the state should be compelled to elect for which one of the offenses it will prosecute; nor will the court compel such election, when the two counts are joined, in good faith, for the purpose of meeting a single offense. It is a practice sanctioned by common custom, and by the law, to charge a felony in different ways, in different counts of the indictment, so as to provide for the different phases which the evidence may present upon the trial; and when such is the bona fide purpose of the joinder of counts, the court never exercises its power of quashing the indictment or compelling an election." After citing many authorities in support of the proposition, the court proceeds: "The principle to be extracted from these authorities is that the court should always interpose, either by quashing the indictment or by compelling an election, when an attempt is made, as manifested by either the indictment or the evidence, to convict the accused of two or more offenses growing out of distinct and separate transactions; but should never interpose in either mode when the joinder is simply designed and calculated to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction." The doctrine of this case was reaffirmed in *Orr v. State*, *supra*, at the last term, and, observing it, the several motions of the defendant to compel the state to elect on which count of the indictment it would proceed, or the particular animal which it claimed as the subject of the offense, were properly overruled. Voluntarily, after the evidence was closed, the prosecuting officer elected to proceed on the first count, and for a particular animal as the subject of the offense, and this was the full measure of the right of the defendant in any event. Whart. Cr. Pl. § 290.

4. The evidence of Stokes, that he had seen several sheep of the prosecutor with the marks changed to be the mark of the defendant, was not subject to any just objection. The tendency of the evidence was to fix on the defendant knowledge of the sheep of the prosecutor and of his mark, a fact material in any phase or aspect of the case.

5. The motion made by the defendant, on the close of the evidence offered by the state, for the exclusion of the evidence because of its insufficiency to support a conviction, was properly overruled. On every trial by jury in a civil or criminal case, there may arise a preliminary question,—a question of law the court must decide,—and that is whether the party on whom rests the burden of proof has introduced evidence which ought properly to be submitted to the jury in support of the issue he is bound to maintain. As the principle is expressed by Greenleaf, borrowing the language of Buller, J., in *Company of Carpenters, etc., v. Hayward*, 1 Doug. 375: “Whether there be any evidence or not is a question for the judge. Whether it is sufficient evidence is a question for the jury.” 1 Greenl. Ev. § 49. The degree of the evidence, whether it must be of such force that, in the opinion of the court, the jury could reasonably conclude the issue was proved, or the burden of proof satisfied; or whether it may have only a tendency to establish the issue, the necessities of this case do not require us to consider. It is enough to say there was not that want of criminating evidence,—such want of evidence of every fact material to a conviction,—as required that the court should withdraw it from the consideration of the jury. The facts and circumstances in evidence, if dissevered and disconnected, may be weak and inconclusive; but their probative force, when combined, as it was the province of the jury to combine them, under proper instructions from the court, may have satisfied them of the guilt of the defendant. If in their conclusions the jury should err, if their verdict should be manifestly wrong, if the evidence was not of that degree justifying a conviction of crime, the court should apply the correction of a new trial.

6. There is no prescribed formula, no certain, conventional method, which must be observed in framing instructions to a jury. The instructions must embody correct legal propositions applicable to the issues and evidence expressed in clear, unambiguous language, free from all involvement, and from all tendency to mislead or to confuse the jury. These are the essential elements of instructions, as defined by repeated decisions of this court; and instructions requested, wanting in them, have been often declared properly refused. In *Bain v. State*, 74 Ala. 38, it was held that a charge requested in these words: "A probability of the defendant's innocence is a just foundation for a reasonable doubt of his guilt, and therefore for his acquittal," asserted a correct legal proposition. The court said: "Probability is the state of being probable; and 'probable' has been defined to be, 'having more evidence for than against;' 'supported by evidence which inclines the mind to belief, but leaves some room for doubt.' Webst. Dict.; Worcest. Dict. It clearly involves the idea of preponderance of evidence, as used in connection with testimony. Manifestly, if the evidence preponderates in favor of the prisoner,—that is, if the evidence in his favor outweighs or overbalances that against him,—it is impossible for a jury not to entertain a reasonable doubt as to his guilt." There are a number of decisions since, approving of this principle or doctrine. This is the first case reaching this court in which there has been the experiment of substituting, in such an instruction, other words asserted to be the equivalents or synonyms of "probable" and "probability." In several of the instructions requested and refused we find the words "likely" and "likelihood," instead of "probable" and "probability." Whatever may be the true significance of these substituted words, however closely they may in some of their significations approximate the words for which they are substituted, their employment in connection with evidence in courts of justice is unusual, and, to say the least, would tend to confuse, rather than to enlighten and aid, the jury. There can be no assurance that the jury would ascribe to them no other significance than that which is attached to "probable" and

"probability," when applied to the evidence they are to consider. While, as we have said, there is no formula, no conventional method, to which instructions must conform, it is essential that the language in which they are expressed be not ambiguous, but be clear, accurate, and precise in its meaning; and an instruction which has a tendency to mislead or to confuse the jury, if not explained, so as to free it of this tendency, may be properly refused. There was no error in the refusal of the several instructions to which we are referring.

In every criminal case, the burden rests upon the prosecution to show beyond a reasonable doubt, and to the exclusion of every other reasonable hypothesis, every fact or circumstance necessary to fix the guilt of the accused. In the present case, if the conduct of the accused, i. e. his acts as developed in the evidence, was explainable upon a reasonable hypothesis consistent with his innocence, there was reasonable doubt of his guilt, entitling him to an acquittal. *Jones v. State*, 90 Ala. 629; 8 South. 383. This is the proposition embodied in the instruction marked "E," and its refusal was error. For the error pointed out the judgment must be reversed, and the cause remanded. The defendant will remain in custody until discharged by due course of law.

Supreme Court of Alabama.

Filed December 18, 1895.

COSTELLO v. STATE

STATHAKIS v. STATE.

PAPALEXANDRAKIS v. SAME.

1. NUISANCE—STREETS—OBSTRUCTION.

When it is established that a party has, permanently and unlawfully, obstructed a material portion of a public street which the public have a right to use and, but for the obstruction, would use, for public purposes, it is presumed that the public have been

injured and put to inconvenience by reason of the obstruction, and this constitutes, in law, an indictable nuisance.

2. SAME.

In such case, the prosecutor need go no further and prove that such erections actually incommode the general public.

3. SAME.

Evidence is not admissible to show that public injury did not result.

4. SAME.

The rule is different where one is charged with an improper and detrimental exercise of his public right to use the street.

5. SAME.

Charter of Birmingham does not impower city to permit the streets to be diverted from their public use to private purposes, by suffering individuals to obstruct and appropriate them.

Appeal from a judgment convicting the appellants of maintaining a public nuisance.

Each of the defendants showed that they had been granted a license in the city of Birmingham to occupy the portions of the highway which were used by them for fruit stands. Upon the introduction of all the evidence, the court, at the request of the state, instructed the jury in writing as follows: "Gentlemen of the jury, if you believe the evidence beyond a reasonable doubt, you should find the defendants guilty." To the giving of this charge in each of the cases, each of the defendants separately excepted.

Walker, Porter & Walker and J. J. Altman, for appellants.

Wm. C. Fitts, Atty. Gen., for the state.

HEAD, J.—These are three several cases, being criminal prosecutions, one against each of the appellants, for erecting or maintaining a public nuisance in the city of Birmingham. The charge against each, as set forth in the complaint, is that in a part of a designated public highway, within the corporate limits of said city, in the county of Jefferson, state of Alabama, he did, knowingly, intentionally, and unlawfully, erect, keep, or maintain,

for the purpose of doing business, a certain fruit stand, by reason whereof said highway, or a portion thereof, was obstructed and made less convenient, to the great damage and common nuisance, not only of all the inhabitants of said city, but to all other good citizens of said state there passing and repassing and laboring. The undisputed evidence showed that Costello, for a year next before the commencement of the prosecution, kept and maintained a fruit stand, constructed of timber and lumber, so arranged as to display fruits, etc., for the purpose of doing business. It was situated on the inside portion of the sidewalk on Twentieth street, in said city, between First and Morris avenues, and next to, and along by the side of, a four-story brick storehouse. It was thirty-one feet long, three feet and eight inches wide, being two feet higher at the lower or outer edge, and rising, as it receded in width towards the storehouse, to a height of four feet next to and adjoining the storehouse; the width at the top, and next to the storehouse, being one foot. Prior to the erection of this stand, there was in the sidewalk, next to the building, an open way, leading to a room or cellar under the building; and in October, 1894, Costello covered this opening, and erected the fruit stand thereon, the stand occupying only the surface space occupied by the cover to the opening. The opening was made by the owners of the storehouse in the year 1887, and remained there until covered by Costello; the city authorities never having objected to it. The cellar or room to which it afforded entrance has not been used since the opening was covered. Costello kept the stand under a lease from the owners of the building. By city ordinance, a license tax of twenty dollars per annum was imposed upon the business of keeping a fruit stand on a sidewalk of the city, which license had been taken out and tax paid by appellants, for the time covered by the complaints. Birmingham, during the time in question, was a city of 26,500 population; and Twentieth street was, and had been for many years, a public street or highway therein; and the place where the stand in question was kept "is in the most populous portion of a part of the business portion of said city, and said Twentieth street and said side-

walk are as much traveled as any other street in said city, and said sidewalk is a part of said highway. The sidewalks were fifteen feet wide. So far as the legal questions presented by the records are concerned, there is no material difference in the facts of the several cases. There are slight differences in the dimensions of the stands. Two are for fruits, and one for candies and confections. They are located at different places in the city, but all on important and commonly used public sidewalks of the city; and they take up, practically, the same sidewalk space, and in the same manner. There was no cellar opening in the two other cases.

Here, then, we have, in either case, the undisputed fact that, at least, three and one-half feet of the fifteen feet width of sidewalk (nearly one-fourth), and nearly thirty feet of its length, were exclusively and permanently appropriated by the defendant to his private uses, to the entire deprivation of the public of the space so appropriated; and to this must be added, as a necessary legal inference from the fact that these stands were used for carrying on the business of selling fruits, etc., the permanent occupation of the sidewalk by the person or persons engaged in making the sales; and by the standing thereon, from time to time, day by day, of customers trading at such stands. The trial court was of opinion that these facts, of themselves, constituted, as matter of law, public nuisances, indictable as such, without requiring the prosecutor (as then and now contended for by appellants' counsel) to go further and prove that such erections actually incommoded the general public. It seems to us that the statement of the case necessarily precludes any other conclusion. It is not and cannot be denied that the public has the right to the use of the entire sidewalk for the purpose of passage and other public purposes; that the appellants have, without lawful authority, permanently appropriated, to their own exclusive use and enjoyment, material portions of the sidewalks in question, thereby wholly depriving the public of the use of such portions. An unlawful deprivation of a substantial legal right necessarily implies injury to the party so deprived; and it is so with reference to the right of the

public to the free use of the streets. When it is established that a party has, permanently and unlawfully, obstructed a material portion of a public street which the public have a right to use, and, but for the obstruction, would use, for public purposes, it is thereby concluded that the public have been injured and put to inconvenience by reason of the obstruction, and this constitutes, in law, an indictable nuisance. Mr. Freeman tersely states the law, as extracted from the numerous authorities he cites, in his extended annotations of *Callanan v. Gilman* (N. Y. App.) 1 Am. St. Rep. 840, (14 N. E. 264), as follows: "The public have a right to passage over a street to its utmost extent, unobstructed by any impediments. Any unauthorized obstruction, which necessarily impedes the lawful use of a highway, is a public nuisance at common law." And Judge Ruffin, a distinguished jurist, said, in *State v. Edens*, 85 N. C. 526: "Any permanent obstruction to a public highway, such as would be caused by the erection of a fence or building thereon, is, of itself, a nuisance, though it should not operate as an actual obstacle to travel, or work a positive inconvenience to any one. It is an encroachment upon a public right, and, as such, is not permitted by the law to be done with impunity." Confusion of ideas upon this subject grows out of the failure to properly distinguish between street obstructions which are per se unlawful, and capable of working public detriment, and those which are not, in themselves, unlawful, but may be so, by virtue of circumstances necessary to be shown in evidence in order to establish the criminality of the act. There are classes of highway obstructions which may create public inconvenience, and yet are not unlawful. Mr. Freeman also makes these appear very clearly. After laying down the principle above credited to him, he proceeds, in the same annotation, to say: "Temporary obstruction and partial occupation of streets may, however, be justified on the ground of necessity. The street may be so obstructed by placing thereon materials for building or repairing, if it be done in such a way as to occasion the least inconvenience to the public, and the obstruction be not continued for an unreasonable length of time. So, too, a pri-

vate person carrying on business may occupy a portion of the street for a reasonable length of time for the necessary purpose of receiving and delivering his goods. A street may also be used for the purpose of moving a building from one place to another, provided it be done in a reasonable and judicious manner. Streets may be lawfully used for other purposes than the accommodation of the traveling public, provided such use be not inconsistent with the reasonable free passage of travelers over them. Slight inconveniences and occasional interruptions in the use of a street, which are temporary and reasonable, are not illegal merely because the public may not, for the time being, have the full use of the highway. * * * If a person finds it necessary to obstruct a public street, he must see to it that the inconvenience to the traveling public be as slight as possible, and that it be allowed to continue for a reasonable time only. And a reasonable time is such as is necessary, in the ordinary course of business, for its removal. A teamster has no right to keep his team standing in the street in such a manner as to impede travel for an unnecessary length of time. If his wagon breaks down, and he is compelled to throw his goods upon the street, he must remove them out of the way in a reasonable time. A tradesman has no right to deposit his goods and wares on the street for the purpose of exposing them for sale. An individual has no right to appropriate a part of the street to his exclusive use in carrying on his business, even though enough space be left for the passage of the public. Nor has a storekeeper any right to use the sidewalk in front of his store as sort of annex to his place of business. If a man's premises are not sufficiently extensive for the transaction of his business, without encroaching upon the street or sidewalk, he is bound to seek more spacious quarters elsewhere. The public convenience is paramount to the necessities of private individuals." No doubt, the habitual and constant occupation of a material portion of the sidewalk for displaying goods for sale, which would naturally interfere with public passage, would be declared a nuisance per se. Speaking of permanent structures, he says: "Permanent structures, obstructing streets, and inter-

fering with their unimpeded use by the public, are nuisances, which may be abated, although there be space left for the passage of the public. The following are instances of such structures, held to be nuisances: A barn occupying nearly half the street in a populous village; a show case in front of a store extending beyond the house line; a bay window sixteen feet above the sidewalk, and projecting three and a half feet over the sidewalk; a bridge extending across a street from the second story of a building on the opposite side, supported by the buildings, and being thirteen feet and three inches above ground; hay scales in the street, in front of the owner's premises; a fruit stand encroaching upon the sidewalk; a show board extending eleven and a half inches over the sidewalk in front of a shop; a wooden awning in front of a store extending over the sidewalk. But in *Hawkins v. Sanders*, 45 Mich. 491; 8 N. W. 98, it was held that such an awning was not per se a nuisance. So, too, in *Osborn v. Ferry Co.*, 53 Barb. 629, it was held that a log of wood placed by the defendant in the public street, at the threshold of its gate, was a nuisance." Mr. Freeman collects and cites a great array of authorities in support of the principles he lays down. We have read the most of them, as well as a number of others, and they establish to our entire satisfaction that obstructions of the kind in the present cases are per se nuisances. Being in themselves, without more, unlawful infringements of the public right to have the free use of the whole of the streets, which includes the sidewalks, for the purposes for which the streets were dedicated or established, they are, without more, conclusive of public injury. In such cases, evidence would not be admitted that public injury did not result. Such evidence, beyond what the facts themselves manifest, would consist in the opinions of witnesses merely. One jury might accord such weight to such opinions as to result in conviction, another in acquittal, when the acts are, without dispute, identical and unlawful, and the legal consequences of both are necessarily the same. It would be a very discordant administration of justice to have Costello convicted and Stathakis acquitted, when both have, without question, committed the very same

unlawful acts, with the same consequences, merely because one jury viewed the opinion of men, as to the consequences, one way, and another jury the other way. Inasmuch as the law, upon the undisputed facts, declares both the nature of the act and its consequences, such opinions will not be received.

The rule is different where one is charged with an improper and detrimental exercise of his public right to use the street. Thus, for instance, as we have seen, a merchant has the right to use the street for receiving and delivering his goods, but he must do so in a reasonable and proper manner,—in a manner that will not unreasonably impede public travel. The act of using the street for such purposes is not, in itself, unlawful. The unlawfulness of the act consists in the unreasonable manner of its performance, producing unnecessary public inconvenience. These are the elements which give the character of wrong to the act otherwise right, and they must be proven, in order to establish the criminal offense. Indeed, it is not so much the improper manner of exercising the right which constitutes the criminal offense, as the inconvenience to the public which results from that manner. Judge Ruffin, in his opinion referred to *supra*, after stating the principle we quoted, in reference to permanent structures, drew the distinction between the two classes of cases, as follows: "But the very object of a highway is that it may be used; and, though travel be its primary use, it still may be put to other reasonable uses; and whether a particular use of it, which does not of itself amount to a nuisance, is reasonable or not, is a question of fact to be judged of by the jury according to the circumstances of the case. Unlike the case of a permanent obstruction just referred to, it is not the manner of using the highway which constitutes the nuisance, but the inconvenience to the public which proceeds from it; and, unless such inconvenience really be its consequence, there is no offense committed." Nothing can better settle the principle than this emanation from so distinguished a judge.

Our own adjudications support our conclusions: *State v. Mayor, etc., of Mobile*, 5 Port. (Ala.) 279; *Hoole v. Attorney*

General, 22 Ala. 190; *City Council v. Wright*, 72 Ala. 411; *Webb v. City of Demopolis*, 95 Ala. 116; 13 South. 289. The following are also some of the many authorities upon the questions here raised: *Hart v. Mayor, etc.*, 9 Wend. 571; 24 Am. Dec. 165; *Rung v. Shoneberger*, 2 Watts, 23; 26 Am. Dec. 95; *Com. v. Wilkinson*, 16 Pick. 175; 26 Am. Dec. 654; *People v. Cunningham*, 1 Denio, 524; 43 Am. Dec. 709; *Johnson v. Inhabitants of Whitefield*, 18 Me. 286; 36 Am. Dec. 721; *Graves v. Shattuck*, 35 N. H. 257; 69 Am. Dec. 536; *State v. Berdetta*, 73 Ind. 185; 38 Am. Rep. 117 (a case of a fruit stand like the present); *City of Alleghany v. Zimmerman*, 95 Pa. St. 287; 40 Am. Rep. 649; *Reimer's Appeal*, 100 Pa. St. 182; 45 Am. Rep. 373; *Bybee v. State*, 94 Ind. 443; 48 Am. Rep. 175; *Smith v. Simmons*, 103 Pa. St. 32; 49 Am. Rep. 113; *Callanan v. Gilman*, 107 N. Y. 360; 14 N. E. 264, and 1 Am. St. Rep. 831; *Yates v. Town of Warrenton*, 84 Va. 337; 4 S. E. 818, and 10 Am. St. Rep. 860; *Cohen v. Mayor, etc.*, 113 N. Y. 532; 21 N. E. 700, and 10 Am. St. Rep. 506, and note. Desty, in his work on Criminal Law, states that front steps are part of the building, and, when they project, the building is in the highway, and such structure is a nuisance at common law; citing *Com. v. Blaisdell*, 107 Mass. 235; *Hyde v. Middlesex Co.*, 2 Gray, 267. Also, a stall for the sale of fruits and confectioneries placed on a public footway is a nuisance, though rent be paid to the adjoining owner; citing *Com. v. Wentworth*, 4 Clark (Pa.) 324.

The fact that Costello's stand was erected on the covering of the open way to the cellar is of no importance. *Com. v. Wilkinson*, supra. It is not contended that the city authorities have any general power to permit or license obstructions of streets, otherwise unlawful. See *Webb v. City of Demopolis*, supra; *Cohen v. Mayor, etc.*, supra. The authorities generally are against such power. The charter of Birmingham does not confer it. Its provisions in regard to streets look to the betterment of the streets for the public purposes for which they were dedicated or acquired. They do not empower the city to permit the streets to be diverted from their public use to private purposes,

by suffering individuals to obstruct and appropriate them. Such a thought was never in the legislative mind.

We are of opinion the judgments of the criminal court were right, and they are affirmed.

United States Supreme Court.

Filed January 13, 1896.

CARVER v. UNITED STATES.

1. EVIDENCE—HOMICIDE—DYING DECLARATION.

In the admission of the declarations of the victim as to the facts of a homicide, the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution.

2. SAME.

Omission to challenge evidence of dying declarations as not properly in rebuttal may waive the mere order of proof, but does not concede that the want of foundation can be excused for any reason.

3. SAME—OBJECTION.

Such declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, or if made when the person is without hope, though he afterwards regains confidence.

4. SAME.

The repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts, if made when hope has been regained.

Appeal from judgment, convicting plaintiff in error of homicide.

The fatal wound was inflicted by the discharge of a pistol on the night of March 25, 1895, at Muscogee, Creek Nation, in the Indian country, but the death occurred at Ft. Smith, Ark., May 19, 1895.

In addition to other evidence, there was testimony to show that Carver and the deceased were attached to each other, that he was very drunk on the night of the homicide; and that he was in the habit of carrying a pistol, which he was flourishing at that time. A declaration in writing in respect of the circumstances

attendant upon the commission of the act, made by the deceased March 27, 1895, was admitted in evidence against objection as made under a sense of impending death.

The testimony of the clerk of the court, Wheeler, to the effect that the deceased, after she was brought to Ft. Smith, which was April 14, 1895, said that her former statement was true, was admitted, subject to an exception because no proper foundation was laid for its admission.

Exceptions were also taken to certain parts of the charge.

Wm. M. Cravens, for plaintiff in error.

Asst. Atty. Gen. Dickinson, for defendant in error.

Mr. Chief Justice FULLER, after stating the facts in the foregoing language, delivered the opinion of the court.

While in the admission of the declarations of the victim as to the facts of a homicide the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution, we think that the evidence of the state of mind of Anna Maledon in that particular, when the declaration of March 27, 1895, was made, and which we need not recapitulate, was sufficient to justify the circuit court in admitting it. *Mattox v. U. S.*, 146 U. S. 140, 151; 13 Sup. Ct. 50. But the testimony of Wheeler stands on different ground, and we are of opinion should not have been admitted.

In answer to leading questions, the witness said that he saw Anna Maledon after she was brought to Ft. Smith; that he asked her whether the declaration of March 27, 1895, was true; and that she replied "it was, in every particular."

The deceased received the fatal wound March 25th, and her statement of March 27, 1895, was admitted as a dying declaration. The interview with Wheeler was on or after April 14, 1895, and whether she then spoke under the admonition of her approaching end or anticipated recovery does not appear.

It has been held that a declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone (*Reg.*

v. Steele, 12 Cox, Cr. Cas. 168), or if made when the person is without hope, though afterwards he regains confidence (State v. Tilghman, 11 Ired. 513; Swisher v. Com., 26 Grat. 963; 1 Greenl. Ev. [15th Ed.] § 158, note a). But the repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts if made when hope has been regained. Nor can we perceive that this is otherwise, because the record states that Wheeler was sworn "in rebuttal." Rebutting evidence is evidence in denial of some affirmative case or fact which defendant has attempted to prove. Our attention has been called to no attempt on behalf of defendant below to prove that Anna Maledon made on her deathbed, after her declaration of March 27th, any retraction thereof, or any statement inconsistent with it, if evidence to that effect would have justified the introduction of this testimony as tending to rebut it.

It is true that counsel for plaintiff in error rested their objection on the ground that no foundation for the admission of the testimony was laid. But, while the omission to challenge the evidence as not properly in rebuttal may have waived the mere order of proof, this did not concede that the want of foundation could be excused for any reason. The contention was that the foundation must be laid, and that covered sufficiently every suggestion that the evidence was admissible without it. And as this was not legitimate rebutting testimony, it could not be admitted without the proper foundation, although the order of proof was waived.

As we understand the record, a sharp controversy was raised over what deceased had said at the time of the homicide, and the evidence of Wheeler may have had so important a bearing that its admission must be regarded as prejudicial error.

Whether the homicide was committed under such circumstances as to reduce the grade of the crime from murder to manslaughter, or as to permit an acquittal on the ground of misadventure, were questions raised in the case on behalf of plaintiff in error; and it is urged that the exception should be sustained to the statement in the charge that, "if a man does not exercise the highest possible care that he can exercise under the circumstances,

when handling firearms, his act passes out of that classification known as an accident." But we do not feel called upon to consider this question, or any of the other errors assigned, as they may not arise on a new trial in the form in which they are now presented.

Judgment reversed, and cause remanded, with a direction to set aside the verdict and grant a new trial.

District Court, D. Colorado.

Filed December 26, 1895.

UNITED STATES v. BEACH.

POST-OFFICE—MAILS—SCHEME TO DEFRAUD.

Schemes and acts, named in section 5480 of the U. S. R. S., are of the kind which are gainful to the wrong doer, and no scheme or artifice which lacks this intent can be within the prohibition of the act.

Henry V. Johnson, for the United States.

Thomas Ward, for defendant.

HALLETT, District Judge.—These indictments are upon section 5480, Rev. St., as amended March 2, 1889 (25 Stat. 873), for using the mails for promoting a scheme and artifice to defraud. The charge is that the prisoner induced the prosecutor to go to Salt Lake City, Utah, and to expend a considerable sum of money in making the journey, upon the false pretense that he could have employment as a nurse from one Perkins. Perkins was a mythical person, and there was no employment of any kind for the prosecutor in Salt Lake City. The point is made against the indictments that there was no motive of gain to the prisoner in making the false representations, and therefore the case is not within the statute. If we could solve the question upon any meaning of the word defraud, it would be difficult to say that "lucri causa" is an element of the offense. Fraud may be only

an artifice to deprive another of his right, without gain to the person practicing it. In the analogous case of cheating and swindling, it is doubtful whether gain to the wrongdoer is an essential element; and in malicious mischief, which this case much resembles, there is no such element. Even in larceny, after much conflict of decision, it is still doubtful whether the taking must be *lucri causa*. 2 Bish. Cr. Law, § 842; 2 Whart. Cr. Law, § 1781. Since the full recognition of malicious mischief as a distinct offense, it would seem that this intent ought to be of the essence of larceny. These considerations are not, however, controlling in the case at bar, for the reason that the statute defines the cases to which it is applicable. The cases mentioned in the statute are: "To sell, dispose of, loan, exchange, alter, give away, or distribute, supply, or furnish, or procure for unlawful use any counterfeit or spurious coin," etc., and "to obtain money by or through correspondence, by what is commonly called the 'sawdust swindle,' or 'counterfeit money fraud,' or by dealing or pretending to deal in what are commonly called 'green articles,' 'green coin,' 'bills,' 'paper goods,' 'spurious treasury notes,' 'United States goods,' 'green cigars,' or any other names or terms intended to be understood as relating to such counterfeit or spurious articles," etc. The words "give away," "distribute," "supply," etc., are obviously inserted to meet evasions of the act,—as where the wrongdoer proposes to sell a picture for a big price, and to give a quantity of spurious money as inducement to the purchase; or where, as in some cases that arose in this district, the wrongdoer offers a worthless town lot as a gift, and charges ten prices for putting the deed on record. The payment of money or something of value for the spurious coin or "green articles" is essential to the fraud in respect to which the mails are to be used, and, plainly enough, the person practicing the fraud is to receive the payment, whatever it may be. There is, therefore, in the offense defined in the statute, the element of loss to the person deceived, and also the element of gain to the offender. The statute is not limited to the particular deceits mentioned in it, such as the "sawdust swindle" and the "counterfeit money

fraud," for the first clause embraces "any scheme or artifice to defraud;" but these words must be taken to mean any scheme or artifice of the general character of those specified in the act. The general language of the act must be limited to such schemes and artifices as are ejusdem generis with those named. Bish. St. Crimes, par. 245. We have discovered that the schemes and artifices named in the act are of the kind which are gainful to the wrongdoer, and thereupon we must declare that no scheme or artifice which lacks this intent can be within the prohibition of the act. The conduct of the prisoner, charged in the indictment, was abundantly harmful to the prosecutor, but it was not gainful to the prisoner, except in the matter of malice and ill will, of which he is not in need; but malice is not the intent specified in the statute. The indictments will be quashed.

Supreme Court of Wisconsin.

Filed January 7, 1896.

EMERY et al. v. STATE.

1. CRIMINAL LAW—REASONABLE DOUBT.

A juryman, in a criminal case, must use all the reason, prudence and judgment which a man would exercise in the most important affairs of life, and an instruction authorizing the use of any less degree of reason, prudence and judgment is erroneous.

2. SAME—EVIDENCE.

Where the plaintiff introduces evidence of a remark made by the defendant, the defendant may on his own behalf give the entire conversation, even though it may contain self serving statements.

3. SAME—INTENT.

When the intent or motive of a party in doing a particular act or making a declaration becomes material, it is permissible for the party to be sworn in regard to it.

4. SAME—HOMICIDE—MALICE.

A defendant, who admits having made an incriminating threat, is entitled to show the circumstances under which it was made,

the accompanying conversation, if any, which called it forth, and the information on which it was based.

5. SAME—PRELIMINARY EXAMINATION—WITNESS.

Section 4786 of the Revised Statutes is directory only, and the examination of a sufficient number of witnesses to justify the magistrate in binding over the defendant for trial will be held to satisfy the statute.

6. SAME—TRIAL—SUMMING UP.

Defendant's counsel cannot, at the close of the testimony on the part of the state and before the introduction of the evidence for the defense, review the testimony on the part of the state for the purpose of showing that it does not warrant a conviction.

7. SAME—INQUEST.

The state may introduce, on the trial, only part of a statement made by defendant at the inquest, without introducing the whole of such statement.

8. EVIDENCE—ADMISSION.

A remark by the sheriff to defendant, where the answer partakes of the nature of an admission, is proper evidence against defendant, where it can only be understood in connection with the sheriff's remark to which it was a reply.

Appeal from judgment convicting plaintiff in error of murder. Upon the trial of the case, it appeared without contradiction that Peter Houston, the deceased, while sitting in his own house, about twelve miles southeast of Grand Rapids, in Wood county, was shot by some person on the outside of the house. At the time of the homicide, Peter was seated near an open window, covered by mosquito netting. He was about twenty-one years of age, and his wife, Emma, whom he had married April 4, 1893, was sitting at a table near her husband at the time of the shooting. Peter and his wife had just finished eating a light supper, and night was rapidly falling, it being somewhere between eight and nine o'clock, when a gun loaded with buckshot was discharged from some place outside of the house, and seven of the shot entered Peter's face and neck, causing instant death. The plaintiffs in error, Emery and Lord, lived about one hundred rods straight east of Peter's house on the main road leading from Grand Rapids to Plainfield, which ran east of south. This road united with a road running past Peter Houston's house, about one and one-half miles north of Emery's and Lord's home, and

the same distance from Peter's home. There was no road leading directly across from Peter's house to the residence of Emery and Lord, but a little distance north there was a crossing between the two roads, making the distance between Peter's house and Emery's house, which could be traveled by vehicles, about three-fourths of a mile. Emery was at the time of the tragedy about forty years old, and with his wife and two boys, aged eight and ten years, respectively, lived upon and worked the farm of the plaintiff in error Lord. Lord was a widower, about sixty-two years old, and lived with Emery and his family. He had lived upon this place for upward of twenty-five years, while Emery had resided there and upon an adjoining farm about eighteen years. Emma, the wife of the deceased, was the daughter of David Jacobs, who, at the time of the tragedy, lived about three miles north of the Houston and Emery residences, on the main road leading to Grand Rapids. There were no houses on the road between Jacobs' place and Peter's place, nor between Jacobs' place and the residence of the plaintiffs in error. The road running south past Jacobs' house divided into two roads about midway between Jacobs' place and Peter's place; one of said roads passing in a southeasterly direction, past Emery's place, and the other in a southwesterly direction, past Peter's place. David Jacobs lived alone with his son, James, who was about twelve years of age, upon a rented farm, at the time of the tragedy. He had come into the community with his daughter, Emma, and son, James, in the summer of 1892. During the fall and winter of 1892, Jacobs and his family lived on the Emery farm, which was about a quarter of a mile south of the Lord residence, and there became acquainted with Lord and Emery, and visited back and forth. In the spring of 1893 they removed to the farm on which Jacobs was living at the time of the tragedy, called the "King Place." There was evidence tending to show that, while Emma was living with her father on the Emery place, she became criminally intimate with Lord. There was also evidence tending to show that David Jacobs had insisted upon having criminal intercourse with Emma since she was about fourteen

years of age. The evidence further showed that Lord and Emery, on one side, and Peter Houston and his father, on the other side, had been on unfriendly terms for a long time, and that threats had been made on both sides. On the 4th day of April, 1893, Peter Houston and Emma Jacobs were married, and for about four weeks after that time they lived with her father upon the King place, under an arrangement by which they were to carry on the farm together. In the first part of May, however, trouble arose between Peter and his father-in-law, and Peter and his wife left the Jacobs place, and moved down to the small house where the murder was committed. This house was about thirty rods from the house of his father, William Houston, where lived William Houston, his wife, and Peter's two brothers, and one sister. The land around Peter's house was uncultivated and unfenced, and had upon it scattering jack pine and scrub oak. The testimony tends to show that the difficulty between Peter and his father-in-law was that Peter found out or suspected the improper relations existing between his wife and her father. Whatever the difficulty was, they parted evidently with bad feelings on both sides. On the day after the murder, a coroner's inquest was held, at which the plaintiffs in error and said Jacobs were all sworn as witnesses, and all denied any knowledge of the crime. Near the side of Peter's house where the shot was fired, two gun wads were found,—one of pasteboard, and one of felt. The evidence tended to show that these wads were of the size used in loading cartridges for a breach-loading 12-gauge gun; and the sheriff having found such a gun in the possession of Emery, apparently recently discharged, and again loaded with buckshot of the same kind with which Peter was shot, Emery was arrested, charged with the crime, and, having waived examination, was committed to await trial. Lord was not arrested, but still continued to live upon his farm. David Jacobs and his son, James, after remaining upon the King place until the fall of 1893, removed to Vernon county, in this state. Emma Houston, wife of the deceased, went to live with her father-in-law. On the 8th day of March, 1894, Emma Houston made complaint be-

fore a court commissioner charging her father with having committed the crime of rape upon her March 21, 1893, upon which complaint a warrant was issued, and David Jacobs was arrested in Vernon county, and confined in jail at Stevens Point, Portage county. During his confinement under this charge, he made a confession in which he stated that the murder of Peter Houston was committed by Emery, himself and Lord being present, aiding and assisting in the crime. Upon the making of this confession, he was taken before the circuit court then in session at Waupaca county, and pleaded guilty to the crime of murder of Peter Houston, and was sentenced to the state prison at Waupun for life. This was on the 14th of March, 1894; and, on the 16th of March following, William Houston made complaint before a justice of the peace charging Lord with the same crime; and he was arrested, and examination thereafter had. He was bound over for trial to the circuit court. The plaintiffs in error were tried together at the October term, 1894, of the circuit court of Wood county. Jacobs was called as a witness, and gave direct evidence against them, in accordance with his previous confession. The plaintiffs in error denied all complicity in or knowledge of the crime. There was circumstantial evidence and evidence of threats and ill will. A verdict of guilty was rendered.

George L. Williams and G. W. Cate, for appellants.

W. H. Mylrea, Atty. Gen., and George R. Gardner, for the state.

WINSLOW, J. (after stating the facts).—There was sufficient evidence to sustain the verdict, and the trial seems to have been in most respects fair and just, but there were two rulings made which, we think, were erroneous, and which necessitate reversal of the judgment.

1. The circuit judge charged the jury on the subject of reasonable doubt as follows: "All men are presumed to be innocent of

crime. No man can rightfully be convicted of crime until the legal presumption of innocence just mentioned shall have been overcome, and his guilt affirmatively proven beyond a reasonable doubt. Such proof of guilt can be made only by the evidence given or received on the trial of the case, and must be, in the judgment of the jury, the just and reasonable logic and effect of the whole evidence. The 'reasonable doubt' mentioned beyond which must be affirmatively proved in order to justify a verdict of guilty means, as its name implies, a doubt resting in reason; and it must arise from the whole evidence fairly and rationally considered. When, after a full and impartial consideration of the whole evidence considered within the rules already stated, the judgment is convinced to a moral certainty that the accused is guilty that there is no reasonable explanation of the facts proven except upon the hypothesis that the accused committed the crime charged, then every reasonable doubt is removed, and a verdict of guilty should follow. Mere fanciful or speculative doubt,—such as a skeptical mind may suggest in any case,—however strong and convincing that the accused is guilty the evidence, as a whole, may be to a reasonable and impartial mind, does not amount to a 'reasonable doubt,' within the meaning of the law. A doubt such as this—one that ignores a reasonable construction of the whole evidence, proceeds upon mere speculation or suspicion—is unreasonable; would acquit one proven guilty as easily as one not so proven; and does not justify a verdict of not guilty." So far the charge is unexceptionable. The judge then proceeded, however, as follows: "On the other hand, when, upon the whole evidence, the judgment and conscience are not convinced of guilt in a degree or to an extent such as would lead a careful and prudent man to act affirmatively in important matters of his own, when the jury feel that upon the whole evidence, rationally considered, guilt is not satisfactorily proven, such feeling amounts to a reasonable doubt of guilt, and in such case the defendants will be entitled to a verdict of not guilty." This latter proposition qualifies all that goes before it on that subject, and it is in direct conflict with the

rule of law as laid down by this court in the case of *Anderson v. State*, 41 Wis. 430. It was there held that the jury should be charged that they must scrutinize the evidence with the utmost caution and care, bringing to that duty the reason and prudence which they would exercise in the most important affairs of life,—in fact, all the judgment, caution, and discrimination they possessed; and if, after such scrutiny, they entertained no reasonable doubt of the guilt of the accused, they should convict; otherwise, acquit. An instruction in that case which gave to the jury as a guide “that prudence and reason which govern you in the ordinary conduct of your affairs” was distinctly condemned, and the judgment was reversed upon that ground alone. The rule laid down in that case has not been departed from nor qualified since. It is squarely applicable to the present case, and it necessitates a reversal of the judgment. It is unnecessary to discuss the reasons of the rule. We are aware that courts in some of the states hold to a different rule, but in this state it has been deliberately declared that a jurymen in a criminal case must use all the reason, prudence, and judgment which a man would exercise in the most important affairs of life, and that an instruction authorizing the use of any less degree of reason, prudence, and judgment is erroneous. In support of this rule, see, also, *State v. Dineen*, 10 Minn. 407 (Gil. 325); *Com. v. Miller*, 139 Pa. St. 77; 21 Atl. 138.

2. Witnesses were called by the prosecution, who testified to having heard the defendant Emery, during the winter before the homicide, remark that if he met Peter Houston in the woods, and they both had guns, he would see that Peter did not get the first shot. When Emery was put upon the stand in his own behalf, he admitted that he might have made such a remark, and was then asked what was the occasion of his making it. This question was objected to, and the objection sustained, and exception taken. The follow colloquy then took place: “Q. Why do you say you may have said that? (Objected to as before. Overruled.) The Court: You need not tell anything you heard previous to that, if you did hear anything. Ans. Because I

might have said it. Q. If you are limited to not giving the conversation, you cannot give it in any other way? Ans. No, sir." It is very apparent that the court, by these rulings, excluded everything else that was said by either Emery or other at the time of the making of the threatening remark, as well as excluded everything that had come to Emery's knowledge which prompted him to make it. That the balance of the conversation was admissible there can be no doubt. Where the plaintiff introduces evidence of a remark made by the defendant, the defendant may unquestionably on his own behalf give the entire conversation, even though it may contain self-serving statements. *Manufacturing Co. v. Frawley*, 68 Wis. 577; 32 N. W. 768; 1 Greenl. Ev. § 201. The evidence of the threat was introduced by the state to show the state of the defendant's mind, to show that he had malice in his heart against the deceased; and hence that he had a motive to kill him; in short, it was to show intent. Now, when the intent or motive of a party in doing a particular act or making a declaration becomes material, it is always permissible for the party to be sworn in regard to it. 3 Rice, Ev. § 288. The defendant could therefore have testified directly as to his intent or feeling towards the deceased when he made the remark, and we think he was also entitled to show what was the occasion of his making it, and the reason that prompted it, even though such reason might involve the introduction of testimony which would otherwise be hearsay. Certain it is to our minds that a defendant who admits having made an incriminating threat is entitled to show the circumstances under which it was made, the accompanying conversation, if any, which called it forth, and the information on which it was based.

There are numerous other assignments of error made on the part of the plaintiffs in error. We have carefully examined them, and do not find them to be well taken. We shall now briefly notice some of the more important of these contentions.

(1) There was a plea in abatement made by the defendant Lord to the effect that he had had no preliminary examination. This plea was based on the grounds—First, that the complain-

ing witness was not sworn on the examination; second, that all of the witnesses for the state were not sworn; third, that the defendants were deprived of the testimony of a material and important witness named James Jacobs, upon such examination, by the acts and direction of the district attorney of Wood county. This plea seems to have been tried upon affidavits and on the justice's record. Rev. St. § 4786, provides that the magistrate holding a preliminary examination shall "examine the complainant and the witnesses to support the prosecution on oath in the presence of the party charged." It is claimed by the plaintiffs in error that this statute is mandatory, and that, unless the complaining witness and all the witnesses known to the state are examined, no legal preliminary examination is had. It is sufficient to say that we cannot agree with this contention. We regard the statute as directory only. A sufficient number of witnesses were examined to amply justify the magistrate in binding over Lord for trial, and this must be held to satisfy the statute. Such was the holding in Michigan under a similar statute. *People v. Curtis*, 54 N. W. 767. As to the claim that the defendants were deprived of the testimony of James Jacobs by the acts and directions of the district attorney of Wood county, it is sufficient to say that the fact was not proven.

(2) At the close of the testimony on the part of the state, and before the introduction of the evidence for the defense, the defendants' counsel claimed the right to review the testimony on the part of the state for the purpose of showing that it did not warrant a conviction. Upon objection, the court ruled that, in opening the defense, he could only comment on the testimony already in, so far as it might be necessary to show the relevancy of the testimony which he expected to introduce. This was plainly right, and is in accordance with the established practice within this state. It is no infringement on the constitutional privilege of being heard by counsel. It is simply a rule which, manifestly, is conducive to the orderly and logical mode of conducting a trial by which the arguments upon the merits are all to

be made after the testimony is in and all the facts are before the jury.

(3) The state was allowed to introduce certain parts of the statements under oath made by the defendant Emery at the inquest, it being objected by the defendant that the state must introduce the whole of the testimony or none. This was not error. The point was directly decided in *Rounds v. State*, 57 Wis. 45; 14 N. W. 865. The defendant was entitled to introduce in evidence the remainder of the statement, and did do so.

(4) The state was allowed to prove a conversation between Emery and the sheriff on the day of Emery's arrest, in which the sheriff said to Emery, "I am satisfied in my own mind that your gun did the shooting," to which Emery replied, "It looks so, don't it?" It is objected that this evidence was inadmissible, as its effect was to introduce the opinion of the sheriff as to whose gun did the shooting. We do not regard the objection as tenable. The answer of Emery partook of the nature of an admission, hence was proper evidence against him; but it could only be understood in connection with the sheriff's remark to which it was a reply.

We do not deem it necessary to notice any other points made. Judgment is reversed as to each plaintiff in error, and the cause is remanded to the circuit court for new trial. The warden of the state prison will deliver the plaintiffs in error to the sheriff of Wood county, who will hold them in custody until discharged therefrom by due process of law.

Supreme Court of Nebraska.

Filed January 21, 1896.

WENDELL v. STATE.

CRIMINAL LAW—JOINDER.

Under section 54 of the Criminal Code, it was erroneous, over proper objections, to try a defendant upon the charge of burning a schoolhouse, joined with one for causing such burning to be done by another person.

Appeal from a judgment convicting plaintiff in error of causing the burning of a school-house.

C. J. Dilworth and J. L. McPheely, for plaintiff in error.

A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the state.

RYAN, C.—Plaintiff in error was tried in the district court of Kearney county upon an information containing three counts, and found guilty upon the second count. Omitting such matters as are not essential to the understanding of the questions presented, these counts were as follows: First Count: "That on the 2d day of April, in the year of our Lord one thousand eight hundred and ninety-five, one Peter Wendell, then and there being, * * * did then and there unlawfully, willfully, and maliciously and feloniously procure, incite, and cause one Ben Pearson, then and there being, unlawfully, willfully, maliciously, and feloniously to set fire to and burn one schoolhouse," etc. Second count: "* * * That on the 2d day of April, A. D. 1895, one Ben Pearson, * * * then and there, unlawfully, willfully, maliciously, and feloniously set fire to and burn one schoolhouse; * * * and that Peter Wendell, then and there being, did, before and at the time of said burning, unlawfully, willfully, maliciously, and feloniously * * * procure, incite, aid, abet, and cause the said Ben Pearson to set fire to and burn said schoolhouse," etc. Third count: "That on the 2d day of April, in the year of our Lord one thousand eight hundred and ninety-five, Ben Pearson * * * did, then and there, unlawfully, willfully, maliciously, and feloniously set fire to and burn one schoolhouse there situated, * * * and that one Peter Wendell, then and there being in said county and state aforesaid, then and there did hire and cause said Ben Pearson to set fire to and burn said schoolhouse, in the manner and form aforesaid," etc. In the second count there is charged that Ben Pearson was guilty of the crime of arson, and that he was feloniously thereto instigated by the plaintiff in error. In this respect the

three counts are alike. In the second count, which was that on which Wendell was found guilty, and which, therefore, is specially essential in this case, there was contained the charge that Wendell not only procured, incited, abetted, and caused Pearson to do the burning, but it was as well charged that Wendell aided Pearson in the act.

The conviction was under section 54 of the Criminal Code, in which it is provided that, "if any person shall willfully and maliciously burn or caused to be burned any dwelling house," etc., "every person so offending shall be deemed guilty of arson, and shall be imprisoned in the penitentiary not more than twenty years, nor less than one year."

The instructions given by the court were evidently framed upon the theory that in the second count of the information there was charged but one offense, for in the second instruction given by the court was contained this language: "In this case the substantive offense charged is the willful, unlawful, and felonious setting fire to said schoolhouse, in said county of Kearney and state of Nebraska, on or about the time alleged in the information; and, as hereinbefore stated, the defendant might have committed the same, if such offense was committed, by personally setting fire to and burning said schoolhouse, or by causing or procuring another unlawfully to do it, or by aiding, assisting, or abetting such other person in such unlawful burning. The state has seen fit to charge the defendant in this case with such burning in each of the ways above set out. This it may lawfully do." The fourth instruction was in the same line as the second, while in the sixth occurs this language: "The court instructs the jury that if you believe from the evidence in this case, beyond a reasonable doubt, that the defendant, either personally, unlawfully, and willfully, burned the schoolhouse by setting fire thereto, or that he caused or procured another to unlawfully and willfully set fire to said schoolhouse, or, knowing that another intended to unlawfully and feloniously set fire to said schoolhouse, and burn the same, aided, abetted, or assisted such person in the commission of said offense in said county and state, * * * in either case said person

would be guilty and liable as a principal of the unlawful and felonious burning of said schoolhouse."

By these instructions there is presented the question whether or not two distinct offenses were charged in the count of the information upon which the plaintiff in error was found guilty. The court assumed that there was charged but one offense. Counsel for the plaintiff in error insists that there were two, each distinct from the other; and there has been no failure properly to preserve that question upon the record. No case has been called to our attention in which is considered the language of a statute similar to the one above quoted. It seems to us, however, that this differs from a case wherein is charged burglary and larceny in conjunction, for in such case the larceny is but the consummation of the intent with which the burglary is committed. Again it is said in section 449, 1 Bish. Cr. Proc. (3d Ed.): "If the pleader is uncertain whether the transactions will appear in the proofs to be embezzlement or larceny, and both are felonies, he may have a count or counts for each. Under like circumstances, counts may be joined for embezzlement and false pretenses." It does not seem to us that any of these considerations justify the joinder of the offense of aiding in burning a house with that of hiring, causing, or procuring another to commit such arson. The proof that Pearson set fire to the schoolhouse described in no way tended to connect Wendell with the offense of causing Pearson to commit this crime. Proof that Wendell aided Pearson is direct evidence of his participation in the offense of Pearson. Proof that Wendell instigated Pearson is evidence only that he in some measure was responsible for the formation of a felonious intent by Pearson, but this intent, if never carried into effect, constituted no crime. If however, the fruition of this intent was the consummation of the crime urged upon Pearson by Wendell, then Wendell became liable for the part which he had taken in the origination of Pearson's felonious intent, and must answer accordingly. It is possible that, by statute, the promoter of the arson might be made liable for its commission; but, in our view,

section 54 of the Criminal Code is not so framed as to express such an intention on the part of the legislature.

The judgment of the district court is reversed.

Supreme Court of Nebraska.

Filed January 21, 1896.

ARGABRIGHT v. STATE.

REPORTERS—TRANSCRIPT.

An order will not be made in this court requiring a reporter of the district court to prepare a transcript of evidence preliminary to the settlement of a bill of exceptions, when the record discloses that a like order had been made by the proper district judge upon the precedent condition that the reporter's legal fees should first be paid, there being shown neither a compliance with such order nor an attempt to review it.

Appeal from a judgment convicting the plaintiff in error of felony.

W. H. Kelligar and John S. Stull, for the motion.

E. O. Kretsinger, opposed.

RYAN, C.—The plaintiff in error has applied to this court for an order to compel the reporter of the first judicial district of this state to furnish a transcript of the evidence upon which this cause was tried. We find in the record that, upon an application to Hon. A. H. Babcock, the district judge who presided at said trial, for an order requiring that said evidence be extended without payment, on account of the poverty of the plaintiff in error, said order was refused; but that, in that connection, it was found that the said reporter, as a condition precedent to making the transcript required of him, had demanded from one of the attorneys of plaintiff in error his fees for making such transcript,

but that such payment had been refused. It was ordered, however, that said reporter furnish the required bill of exceptions upon the tender to him of his legal fees for such services. As there has been no attempt to review or comply with this order, plaintiff in error is not entitled to the order asked of the court. Accordingly, it is denied.

Judgment accordingly.

Supreme Court of Nebraska.

Filed January 22, 1896.

HASKINS v. STATE.

1. CRIMINAL LAW—INSTRUCTION.

It is error to give an instruction infringing on the province of the jury.

2. SAME.

An instruction in a criminal case is erroneous which has the effect to shift the burden of proof from the state to the accused.

'Appeal from a judgment convicting plaintiff in error of larceny.

J. G. Thompson and McClure & Anderson, for plaintiff in error.

A. S. Churchill, Atty. Gen., George A. Day, Dep. Atty. Gen., and John F. Fufts, for the state.

NORVAL, J.—The plaintiff in error, Fred W. Haskins, was tried in the court below upon an information filed by the county attorney, containing two counts, the first charging him with horse stealing, and the second charging him with grand larceny by stealing a certain buggy, harness, and other personal property of the prosecuting witness. The accused, on being convicted of both offenses, was sentenced to imprisonment in the penitentiary.

for the term of two years, and to reverse such judgment and sentence is the purpose of these proceedings. The crimes charged, if committed at all, occurred at the same time, and as a part of the same transaction. The testimony embodied in the bill of exceptions, which was introduced on behalf of the state, tends to show: That the plaintiff in error hired, for the period of three weeks, a team of horses, harness, and buggy,—being a portion of the property he was charged with stealing,—from the prosecuting witness, for the alleged purpose of going from Oxford, this state, to Gretna, to bale some hay. The property was not returned to the owner within that time, and a search was instituted therefor. That plaintiff in error, instead of taking the outfit to Gretna went to Lincoln with it, where he attempted to dispose of the same, and did sell the harness to one J. H. Philpot for the sum of six dollars. The horses and buggy were found at a livery stable in the capital city. The defendant below introduced evidence tending to prove that the prosecuting witness, at the time of the hiring, authorized the accused to sell or trade the property, if he found an opportunity so to do. A further statement of the testimony is unnecessary to an understanding of the questions we shall consider.

Forty-nine errors are assigned upon this record, but we shall only notice two, which are predicated upon the fifth and sixth instructions given by the court upon its own motion. These instructions are as follows: “(5) If you find from the evidence that after the taking of the property by the defendant from the complaining witness, Henry Glahn, that he sold such property, or any part of it, or attempted to sell the same, or any part of it, with the intention of appropriating the proceeds thereof to his own individual use and benefit, this is presumptive evidence that the original taking of the goods was felonious; and, unless such sales or attempted sales are satisfactorily explained, you should find the defendant guilty. (6) The court instructs the jury that if they find that Henry Glahn, the prosecuting witness, parted with the possession of the property described in the information under the belief on his part that he was loaning such property

to the defendant for a certain length of time, it is not necessary that such time should elapse before taking steps to regain possession of the same, and it is immaterial, as far as the crime charged in the information is concerned, what the length of said time was. But if, at any time after the taking of said property by the defendant, either before or after the expiration of the time understood by the said Henry Glahn in which said property was to be returned, the defendant sold, or attempted to sell, said property, or any part of the same, with the intention of appropriating the proceeds thereof to his own individual use and benefit, then the crime charged in the information is sufficiently proven; and, unless the defendant satisfactorily explains such sales or attempted sales, you should find the defendant guilty." Obviously, both of these instructions are bad. The fifth is so conceded by the attorney general, and for that reason he has properly declined to file a brief. By these paragraphs of the charge the jury are told that if the accused sold, or attempted to sell, the property, or any portion thereof, with the intent to appropriate the proceeds, they should infer therefrom that the original taking was felonious, and should convict, unless the sales or attempted sales were satisfactorily explained by the defendant. This is not the law, for two reasons. The effect to be given to the sale or attempted disposition of the property was for the jury to determine, when considered in connection with all the other evidence adduced on the trial; hence the instructions invaded the province of the jury. Moreover, during the entire progress of the trial, the law surrounds the defendant with the presumption of innocence, and requires the prosecution to establish his guilt beyond a reasonable doubt. Yet these two instructions shifted the burden of proof from the state to the accused, by requiring him to overcome the presumption of guilt which the trial court told the jury arose from the sale or attempted disposal of the property. In a criminal trial the burden of proof does not shift, but is on the state at all stages of the trial. The instructions were therefore erroneous, and prejudicial to the prisoner. *Burger v. State*, 34 Neb. 397; 51 N. W. 1027; *Robb v. State*,

35 Neb. 285; 53 N. W. 134; Dobson v. State, 46 Neb. 250; 64 N. W. 956; Metz v. State, 46 Neb. 547; 65 N. W. 190. For errors indicated in these instructions, the judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Supreme Court of Michigan.

Filed January 16, 1896.

MAYNARD, Prosecuting Attorney, v. EATON, Circuit Judge.

1. EXCISE—DRUGGIST.

A druggist who has complied with the law by filing a bond, while he may be guilty of an offense, is not guilty of an offense in keeping his drug store.

2. SAME—INDICTMENT.

If it is sought to charge him with a violation of the law in unlawful selling, the offense should be specified in such manner that the accused may know what he is called upon to meet.

Proceeding for a writ of mandamus.

Horace S. Maynard, in pro. per.

John M. Corbin, for respondent, Clement Smith, circuit judge.

MONTGOMERY, J.—Relator filed an information against one Frank Brainerd, in which he charged said Brainerd with a violation of section 2283a, 3 How. Ann. St., in keeping a drug store, and alleged that he was not then engaged in keeping such place as a druggist or registered pharmacist, and not so keeping such place under and in compliance with the restrictions and requirements imposed upon druggists and registered pharmacists by the general laws of this state. It appears from the petition and return that the prosecution relied for conviction upon the proof of a single unlawful sale, and the question is whether, under

such information, a conviction would be justified upon this proof. We are not dealing with a case in which a party claiming to be a druggist has failed wholly to comply with the law by filing a bond, but the question is whether one who has in this respect complied with the law may be convicted of unlawfully keeping a place by proof of an unlawful sale. We held in *Bishopp v. Lane*, 94 Mich. 461; 53 N. W. 1093, that a druggist might properly be informed against under this section for selling liquor, if the information negatives the terms of the exception. It was there said that this section does not exempt druggists from the provisions of the act, but only exempts such as sell under and in accordance with the restrictions imposed upon them by the laws of the state. See, also, *People v. Murphy*, 93 Mich. 41; 52 N. W. 1042. These cases were, however, cases of unlawful sale, and in each case the information fully apprised the accused of the nature of the offense charged. It is clear that a druggist cannot sell liquor as a beverage, or without complying with the statutory regulations, and escape responsibility for his act by claiming that he is within the exceptions of the statute; but the question here is, what is the offense charged, and what is the offense which the druggist who has complied with the law by filing his bond commits when he makes a sale unlawfully? We do not intimate that one who is a druggist, and who has failed to file his bond, may not be prosecuted under this section, as in such case it would seem to be an offense for him to keep a place where liquors are sold or kept for sale. But a druggist who has complied with the law in this respect is not guilty of an offense in keeping a place where liquors are sold or kept for sale; and, however we may disguise it, a charge of this nature, based upon proofs of a single sale, is an attempt to charge a distinct offense of an invalid and unlawful sale, and this under general language, which gives the accused no information of the precise offense which it is the intention of the prosecutor to prove. If the contention of the prosecutor is sound, then, under such an information, any—the slightest—infraction of the regulations relating to druggists would render the druggist liable for keeping a place prohibited by statute. We

think this is not the legislative intent, but that a druggist who has complied with the law by filing a bond, while he may be guilty of an offense, is not guilty of an offense in keeping his drug store; and that, if it is sought to charge him with a violation of the law in unlawfully selling, it is not a hardship to require that the offense be specified in such manner that the accused may know what he is called upon to meet. These views agree with those of the circuit judge, and it follows that the application for a mandamus should be denied.

McGRATH, C. J., took no part in the decision. The other justices concurred.

Supreme Court of Nebraska.

Filed January 9, 1896.

NICHOLS v. STATE.

1. BANKS—DEBTOR AND CREDITOR.

The law presumes that the relation existing between a bank and its customer is that of ordinary debtor and creditor.

2. SAME—DEPOSIT.

Whether a deposit made in a bank by its customers is a general or special one is a question of fact to be determined from the intention of the parties, but, in the absence of evidence, the law presumes such a deposit a general one.

3. SAME—PRESUMPTION.

Where a customer of a bank, who has overdrawn, and thus stands indebted in open account to the bank, makes a general deposit therein, the presumption of law is that such deposit was made and received towards the payment of such overdraft.

4. SAME—INSOLVENT.

The object of the enactment of sections 637, 638, Comp. St. 1895, was to prevent an insolvent banking association from borrowing money,—that is, receiving money on deposit, and becoming debtor therefor; but said sections should not be so construed as to render an officer of a banking association guilty of a felony for permitting

a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent.

5. SAME.

N. was indicted for receiving a deposit in a bank of which he was cashier, knowing at that time the bank was insolvent. The state, to sustain the indictment, offered evidence which tended to show the existence of the bank; that N. was its cashier; that it was insolvent, to his knowledge, on the 18th of February, 1895; and that on said date one M. deposited in said bank \$11. N. then offered to prove that when M. made such deposit he was overdrawn at the bank \$15.30. The court excluded the offer. Held, that the evidence offered tended to show that the deposit made by M. and accepted by N. was intended by the parties to apply towards the payment of M.'s debt to the bank; and that, so long as N. remained lawfully in charge of the bank as its cashier, he had the right to accept money in payment of any debt owing by any person to the bank; and that, therefore, the court erred in excluding the evidence offered.

Appeal from a judgment convicting plaintiff in error of receiving a deposit in a bank knowing of its insolvency.

H. M. Sullivan and Wall & Burrows, for plaintiff in error.

A. S. Churchill, Atty. Gen., George A. Day, Dep. Atty. Gen., and Long & Matthew, for the state.

RAGAN, C.—In the district court of Sherman county Albert T. Nichols was convicted of the crime of receiving a deposit in a bank of which he was cashier, the bank then and there being, to his knowledge, insolvent; and sentenced to a term in the penitentiary. He brings the judgment of the district court here for review. There are numerous errors assigned and argued here for the reversal of this judgment, of which we shall notice only one. Section 22, c. 8, Comp. St., provides: "No bank, corporation, partnership, firm, or individual transacting a banking business in this state shall accept or receive on deposit for any purpose money, bank bills, U. S. treasury notes, or currency or other notes, bills, checks, drafts, credits, or currency when such bank, corporation, partnership, firm, or individual is insolvent." And section 23 provides: "If any bank, corporation, partner-

ship, firm, or individual transacting a banking business in this state shall receive or accept on deposit any such deposits as are named and set forth in section twenty-two (22) when said bank, corporation, partnership, firm or individual is insolvent any officer, director, cashier, manager, member of the partnership or firm, individual or managing party thereof, who shall knowingly receive or accept, be accessory to, or permit or connive at the receiving or accepting on deposit therein or thereby such deposits as aforesaid, shall be guilty of a felony," etc. The information charged that Nichols, being the cashier of the People's State Bank of Litchfield, a banking corporation organized under the laws of the state and doing business in said Sherman county, on the 18th day of February, 1895, received a money deposit of eleven dollars from one Henry Miller, the said People's State Bank of Litchfield being then and there, to the knowledge of the said Nichols, insolvent. On the trial the state produced evidence showing the existence of the banking corporation, that Nichols was cashier thereof, and that on the 18th of February, 1895, one Henry Miller made a general deposit in said bank of the sum of eleven dollars; and that the state also offered evidence which tended to show that the said bank was at that date, to the knowledge of the said Nichols, insolvent. The record contains the following: "July 13, 1895, 8 o'clock a. m. Argument to jury about to be commenced by County Attorney J. W. Long for the prosecution. Defendant here asks leave to withdraw his rest, and to put on the witness stand O. S. McCurrie, by whom he can show that on the 16th day of February, 1895, the account of Henry Miller, the prosecuting witness herein, in the People's State Bank of Litchfield, Nebraska, was overdrawn fifteen dollars and thirty cents (\$15.30), and that no deposit was made by him on the 17th; and that the first deposit made or money brought in to the bank by him after the 16th was the eleven dollars charged in the information in this case; and at the time it was brought in the said Henry Miller was overdrawn in his account with said bank in the sum of fifteen dollars and thirty (\$15.30) cents. The counsel for the state object as immaterial,

irrelevant, incompetent, and too late at this time. The Court: The request is denied, for the reason that the fact sought to be shown is immaterial, irrelevant, incompetent, and not because it is too late. Defendant excepts."

The evidence shows that Miller was a customer of the bank, and, this being so, the relation which the law presumes existed between them was that of debtor and creditor. *Marine Bank v. Fulton Bank*, 2 Wall. 252; *Thompson v. Riggs*, 5 Wall. 663; *Bank v. Millard*, 10 Wall. 152. The evidence tends to show that the deposit made by Miller on the 18th was a general one. Whether the deposit was a general or special one was, of course, a question of fact to be determined from the intention of the parties, but a deposit is presumed to be a general one, in the absence of evidence to the contrary. *Brahm v. Adkins*, 77 Ill. 263; *In re Franklin Bank*, 1 Paige, 249; 1 Morse, Banks, § 186. Since the relation existing between Miller and the bank was that of debtor and creditor, and since the offer was to show that Miller was overdrawn at the bank—that is, that he was indebted to the bank in open account—in the sum of fifteen dollars and thirty cents when he made the deposit of eleven dollars on the 18th of February, the presumption of law is, in the absence of evidence to the contrary, that he made this deposit in payment, so far as it would reach, of his debtor overdraft at the bank. *Hansen v. Kirtly*, 11 Iowa, 565; *Poucher v. Scott*, 98 N. Y. 422. If the bank, on the date that Miller made his deposit, was insolvent, and if Nichols knew that fact, yet, so long as he remained lawfully in charge of the bank, he had the right, as its cashier, to accept money in payment of any debt owing by any person to the bank. At least, by so doing he did not violate the statute just quoted. The deposit made by Miller in the bank on the 18th was in the nature of a loan to the bank. *State v. Keim*, 8 Neb. 63; *Bank v. Gandy*, 11 Neb. 431; 9 N. W. 566; *State v. Bartley*, 39 Neb. 353; 58 N. W. 172. And, had Miller not been indebted to the bank in a sum equal to the deposit he made, then Nichols, knowing the insolvent condition of the bank, and taking the deposit, would doubtless have violated the statute; for the very object of this

enactment was to prevent an insolvent banking association from borrowing money,—that is, receiving money on deposit and becoming a debtor to a depositor therefor. But we do not think that the act should be so construed as to make an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent. To give it this construction is to obey the letter of the law and to violate its spirit. Under the evidence in the record and that offered by Nichols and excluded by the court, the eleven dollars received by Nichols from Miller on the 18th of February, and put to Miller's credit on the books of the bank, was not an acceptance by Nichols, as cashier, of that amount of money, to be held on deposit for Miller, within the meaning of the statute quoted, but was an acceptance of that amount of money by Nichols from Miller in payment of the latter's debt in open account to the bank. The district court erred in excluding the evidence offered. Its judgment is reversed, and the cause remanded, with instructions to grant Nichols a new trial.

Reversed and remanded.

Supreme Court of Nebraska.

Filed January 9, 1896.

RAUSCHKOLB et al., v. STATE.

1. INFORMATION—INDORSEMENT OF NAMES.

In the discretion of the trial court, the names of additional witnesses may be indorsed by the county attorney on the information after the filing thereof, and before the trial.

2. SAME—CONTINUANCE.

In such case, however, where a request is made to postpone the trial for twenty-four hours, to enable the defendant to meet the testimony expected to be given by the person whose name is

so indorsed, it is an abuse of discretion to deny such request, if such witness is examined on the trial, and gives material testimony for the state, in making out its case in chief.

Appeal from a judgment convicting plaintiffs in error for keeping intoxicating liquors for sale without a license.

John S. Stull and C. P. Edwards, for plaintiffs in error.

A. S. Churchill, Atty. Gen., George A. Day, Dep. Atty. Gen., for the state.

NORVAL, J.—This is a prosecution brought under section 20, c. 50, of the Compiled Statutes of this state, for keeping and having in possession for sale, without a license, certain intoxicating liquors. The prisoners were found guilty, and the judgment rendered against them upon the verdict is before us for review. The record discloses that the case was continued from term to term until the 20th day of March, 1894, when, upon a showing made by the county attorney, permission was given, over the objection of defendants, to indorse upon the information the name of Levi Shores. An exception to the ruling was taken, and the defendants thereupon, by reason of said indorsement, asked that they be given twenty-four hours in which to prepare for trial. This the court refused, but arraigned the defendants at once, and forthwith impaneled a jury to try the case, and on the same day a verdict of guilty was returned. The permitting the county attorney to indorse the name of the witness on the information, and refusing defendants' request to postpone the trial, are assigned for error.

Section 579 of the Criminal Code provides that the prosecuting attorney shall indorse on the information the names of the witnesses known to him at the time of filing the same; and at such time before the trial of any case as the court may, by rule or otherwise, prescribe, he shall indorse thereon the names of such other witnesses as shall then be known to him. In the case under consideration, it appears from the affidavit of the county attorney that he was not such officer when the information was

filed, and that he had no means of knowing that Levi Shores could give material testimony until the time the application was made to indorse his name. The statute gives authority to indorse upon an information the names of additional witnesses after the filing thereof, and before the trial. It is discretionary with the trial court whether such permission shall be given or refused, and its ruling in that regard is no ground for disturbing the verdict where no abuse of discretion is made to appear. Upon the showing made, we think the discretion of the court was properly exercised in authorizing the name of the witness to be indorsed on the information.

The denial of the defendants' request for a postponement of the trial is fraught with more serious consequences. It was the duty of the trial court, in allowing the indorsement of the name of an additional witness on an information, to protect the rights of the accused; and where a reasonable request is made to delay the hearing, in order that the defendant may meet the testimony expected to be given by the person whose name is so indorsed, the court should give the defendant a reasonable time to prepare his defense. It is doubtless, true, as contended by the attorney general, that an application of the character indicated is addressed to the sound discretion of the court, and, unless prejudice is shown to have resulted from a denial thereof, the ruling will not be disturbed by this court. The bill of exceptions shows that Levi Shores was a most important witness for the state in making out its case in chief. His testimony was to the effect that he bought intoxicating liquors of the defendants at the place where the liquors in question were kept. The purpose of this testimony was to establish the intent of the defendants in keeping the liquors,—one of the essential ingredients of the crime charged. A reasonable postponement of the trial should have been allowed the defendants to meet this testimony, and the twenty-four hours asked by the defendants was not an unreasonable time. There was an abuse of discretion in refusing this request. *Parks v. State*, 20 Neb. 515; 31 N. W. 5; *Stevens v. State*, 19 Neb. 647; 28 N. W. 304.

The conclusion reached in *Gandy v. State*, 24 Neb. 723; 40 N. W. 302, cited by the state, does not conflict. There, additional names were indorsed upon the information immediately preceding the trial, and a continuance was thereupon requested by the defendant, which was denied. The testimony of those whose names were thus indorsed was immaterial, and the continuance was asked over the term. In these important respects the case differs from the one at bar.

Other errors are assigned, but the conclusion already reached makes their consideration unnecessary. The judgment is reversed, and the cause remanded for further proceedings.

Reversed and remanded.

Supreme Court of Nebraska.

Filed January 9, 1896.

LAWHEAD v. STATE.

1. INDICTMENT—LARCENY.

Different criminal acts, constituting parts of the same transaction, such as burglary with intent to steal particular property and the stealing of such property, may be charged in the same indictment or count thereof. *Aiken v. State*, 59 N. W. 888, 41 Neb. 263.

2. CRIMINAL LAW—EVIDENCE.

It is not error, in a prosecution for larceny, to charge that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction upon which they would act in their own most important affairs or concerns of life." *Polin v. State*, 16 N. W. 898; 14 Neb. 540; *Willis v. State*, 61 N. W. 254; 43 Neb. 102.

3. SAME—INSTRUCTION.

Where the jury have been fully advised respecting the distinction between grand larceny and petit larceny, it is not error for the trial court to add that they have nothing to do with the question of the penalty, and that it is their duty to render a verdict in accordance with the evidence, without regard to its effect upon the accused. *Ford v. State*, 64 N. W. 1082; 46 Neb. 390.

4. SAME.

Certain instructions held properly refused, the propositions therein embraced having been given by the court on its own motion in language quite as favorable to the accused.

5. LARCENY—PROOF.

Evidence examined, and held to sustain the conviction of the charge of larceny.

Appeal from a judgment convicting plaintiff in error of larceny.

F. G. Hamer and Greene & Hostetler, for plaintiff in error.

A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the state.

POST, C. J.—The plaintiff in error was by the district court for Buffalo county adjudged guilty of grand larceny, and sentenced to a term in the penitentiary, which judgment he now seeks to have reversed by means of a petition in error addressed to this court.

The first proposition to which we will give attention is that the verdict is contrary to law, for the reason that the indictment includes in the same count a charge of burglary as well as of larceny. The charge is in the usual form, and concludes as follows: "Then and there being found in said barn, feloniously and burglariously did steal, take, and carry away, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Nebraska." It is said by counsel that: "The stealing that is here charged is a burglarious stealing. * * * If the answer be that he is charged with both burglary and theft, I reply that he cannot be so charged in the same count, and that the indictment is bad for duplicity." To

that proposition we cannot give our consent. It is, on the contrary, firmly established by authority that burglary and larceny, where each constitutes part of the same transaction, may be charged in the same count, and the defendant may be found guilty of larceny only. *Aiken v. State*, 41 Neb. 263; 59 N. W. 888, and authorities cited.

2. It is next alleged that the court erred in giving the following instructions on its own motion: "The court instructs you that by a reasonable doubt is not meant that the accused may possibly be innocent of the crime charged against him, but it means an actual doubt having some reason for its basis. A reasonable doubt that entitles to an acquittal is a doubt of guilt reasonably arising from all the evidence in the case. The proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction on which they would act in their own most important concerns and affairs of life." The specific objection to the foregoing instruction as made in the motion for a new trial is to the last sentence or paragraph thereof. That portion of the instruction to which the criticism is directed is a substantial copy of the charge approved by this court in *Polin v. State*, 14 Neb. 540; 16 N. W. 898; *Langford v. State*, 32 Neb. 782; 49 N. W. 766; and *Willis v. State*, 43 Neb. 102; 61 N. W. 254. The use of the qualifying word "ordinary" instead of "ordinarily," as in the instruction approved, is probably the result of an error in transcribing. But, however that may be, the variance is unimportant, and presents a question of grammatical construction, rather than a question of law.

3. During the deliberation of the jury the following proceedings were had, as disclosed by the record: "Question by jury: What is the difference in punishment between grand larceny and petit larceny? Answer by the court: Grand larceny is where the property stolen is of the value of thirty-five dollars or upwards, and punishable by confinement in the penitentiary not less than one year and not more than seven years. Petit larceny is where the property stolen is of the value of less than thirty-five dollars,

and is punishable by imprisonment in the county jail not exceeding thirty days, and, in addition, may be fined one hundred dollars, and also to make restitution to the owner of the property stolen in double its value. The court desires to add that it answers these questions in the hope that it may help your investigations, but desires to say further that it is your duty to pass upon the evidence, and declare your verdict thereon, irrespective of what the punishment may be. This matter is for the court. You have done your whole duty when you have passed upon the facts as shown by the evidence." Exception was taken to the cautionary language with which the foregoing instruction concludes, and which exception is the ground of the next assignment of error. The question here presented was practically determined in *Ford v. State*, 46 Neb. 390; 64 N. W. 1082, where it was said that: "Where the jury are not required to fix the punishment in a criminal prosecution, it is not error for the trial judge to refuse to instruct them as to the penalty prescribed by the statute for the offense, or to permit that question to be argued to the jury." The only difference between that case and the case at bar is that in the former counsel was refused permission to comment upon the penalty for larceny in their argument to the jury, while in the latter the question was disposed of by instruction. The court therefore did not err in the ruling assigned.

4. Certain witnesses for the state had been employed as detectives to procure evidence against the accused, and instructions requested by the latter regarding the weight to be given the testimony of such witnesses were refused, and which refusal is also assigned as error. The request of the accused was based upon the holding of the court in *Preuit v. State*, 5 Neb. 377, and in *Heldt v. State*, 20 Neb. 492; 30 N. W. 626. But the same proposition had been given in the charge of the court in language deemed by us more appropriate than that employed in the instruction approved in *Preuit v. State*. The trial court did not err, therefore, in refusing the request above mentioned.

5. The accused and Joseph Roof were jointly charged with burglariously breaking and entering a certain barn, the property

of one Paist, with intent to steal harness, corn, and other property, and with the actual theft of the property therein described. Roof, it appears, was soon thereafter arrested, and confessed to his participation in the theft, and also implicating the accused in said crime. In pursuance of an understanding with the former, two witnesses for the state—Gass and Overmire—secreted themselves behind a blanket stretched across his cell, when the accused, who had just been arrested, was placed therein, when, according to said witnesses, the following conversation was had, quoting from the testimony of Overmire: “Sheriff Nutter brought Lawhead in there, and Roof sat on a chair towards the back end of the hallway, and said to him, ‘You can stay in there,’ and then he (Nutter) went upstairs. Lawhead said, ‘Hello, old man; you are here, are you?’ Roof said, ‘Yes, I’m here.’ Lawhead said, ‘How are you feeling?’ Roof said, ‘Pretty badly.’ Lawhead said, ‘Well, you old cuss, if you had not given me away as you did, we would both have been out of here.’ Roof said: ‘I told you not to take the harness. If you had not it would have been all right.’ Lawhead said, ‘I know that, but I would not give a man away. * * * Roof said, ‘What did you do with the harness?’ Lawhead said, ‘If I told you, you would go and tell the officers right away, and it would put us both in the pen.’ He said he needed the harness in his business, and Roof was kicking all the time about the harness.” The foregoing statement is corroborated by Gass, although it is denied in toto by the accused. This evidence, it is strenuously insisted, is insufficient to sustain the judgment of conviction, and that the verdict should have been set aside upon that ground. But we think otherwise. According to the settled law of this state, a conviction may rest upon the uncorroborated evidence of an accomplice when sufficient, in connection with the other evidence, to satisfy the jury beyond a reasonable doubt of the guilt of the accused. *Olive v. State*, 11 Neb. 1; 7 N. W. 444; *Lamb v. State*, 40 Neb. 312; 58 N. W. 963. In the case at bar the larceny is, as we have seen, clearly proven, and is practically admitted by counsel. Roof, the accomplice, was found in possession of a

part of the stolen property, and the admissions of the accused without doubt strongly tended to connect him with the perpetration of the crime. The evidence appears to have satisfied the jury beyond a reasonable doubt of his guilt. They were properly cautioned regarding the credit due to the testimony of the witnesses of the state, but they were, after all, the judges of the weight of the evidence, and to interfere with their verdict would be a reversal of the oft-asserted and firmly established rule of the court.

There are other propositions discussed in the brief by counsel. We have, however, noticed all questions presented by the record before us. The judgment of the district court is affirmed.
Affirmed.

Supreme Court of Nebraska.

Filed January 9, 1896.

WILLIAMS v. STATE.

1. HOMICIDE—INSTRUCTION.

An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous.

2. SAME.

The effect of the evidence and the inferences deducible therefrom are for the jury, and for the court to instruct the jury that the evidence establishes a certain controverted fact in issue is an unwarranted assumption of the functions of the jury.

3. SAME.

Where, on the trial of a murder case, in which the defense is temporary insanity, the court undertakes to detail in an instruction what evidence the jury may consider in determining whether the prisoner knew the killing was wrong, the court must impartially recite the material evidence offered both by the state and the prisoner to sustain their respective theories of the homicide.

4. SAME.

It is prejudicial error for the court in such a case to group together in an instruction the important material facts put in evidence by the state as to the prisoner's sanity, and omit all mention of the evidence produced by the prisoner tending to traverse that of the state.

Appeal from a judgment convicting plaintiff in error of murder in the second degree.

John Heasty and W. H. Barnes, for plaintiff in error.

A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., and E. H. Hinshaw, for the state.

RAGAN, C.—In the district court of Jefferson county George Williams was convicted of the crime of murder in the second degree for the killing of one Charles A. Smiley, and sentenced to imprisonment in the penitentiary for thirteen years. Williams brings the judgment of the district court here for review.

1. Of the errors assigned and argued we shall notice only one. Williams' defense was, in substance, that at the time he committed the homicide he was temporarily insane, being then and there deeply intoxicated, and in a state of frenzied excitement, resulting from such intoxication and a vile and opprobrious remark made concerning his wife by Smiley, and an assault and battery inflicted upon him by Smiley. The district court charged the jury as follows: "The court instructs the jury that if they believe from the evidence in this case beyond a reasonable doubt that the defendant did, upon the 20th day of August, 1894, have a quarrel with the deceased, and that deceased struck defendant, and knocked him down; that defendant afterwards said that he would kill the deceased, and that he would get a gun and do him before twelve o'clock; and that defendant did get a loaded revolver, and follow and hunt up the deceased, and shoot and kill him; and thereafter stated that he had come down to kill the son of a bitch, and hoped he had killed him; and when asked why he had killed the deceased pointed to a bruise or wound on his face

where the deceased had struck him, and said, 'See what he done to me;' and when asked what he had killed deceased with said, 'A brand-new thirty-eight, and a damned good one;' and that he had gone down to kill him, and hoped he had; and told his wife that he had got the revolver when she was at supper,—then the jury have a right to consider all these facts in determining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." This instruction was prejudicially erroneous for several reasons: First, the court told the jury that if they found from the evidence that Williams said that "he would get a gun and do him before twelve o'clock," etc. The record contains no evidence of any such remark made by the prisoner. The jury could not find a fact outside the evidence, and the injustice to the prisoner in this part of the instruction was that the jury, without inquiry or reflection, were likely to take it for granted that the prisoner had made the threat, because the court in its instruction assumed that he had. An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record is erroneous. *Frame v. Badger*, 79 Ill. 441. If by an instruction a question material to the issue, and without any evidence to support it, be submitted to the jury, it is error. *Dunbier v. Day*, 12 Neb. 596; 12 N. W. 109. See, also, for the same principal, *McCready v. Phillips*, 44 Neb. 790; 63 N. W. 7.

2. Again in this instruction the court said to the jury: "If you believe from the evidence that the defendant did get a loaded revolver, and follow and hunt up the deceased," etc. No such fact was testified to in such language. We assume, for the purposes of this case, that such a fact was inferable from the evidence; but who was to draw such an inference? The effect of the evidence and the inferences deducible therefrom were for the jury, not for the judge. By this statement the court assumed that the evidence warranted a certain inference, and in doing so he invaded the province of the jury. *Trust Co. v. Doig*, 70 Ill. 52; 2 *Thomp. Trial*, 2290; *Omaha F. & E. Ass'n v. Missouri*

Pac. Ry. Co., 42 Neb. 105; 60 N. W. 330; Terry v. Starch Co., 43 Neb. 866; 62 N. W. 255.

3. But the most serious defect in this instruction consists in this: In the instruction the court grouped together the important material facts put in evidence by the state to sustain its theory of the homicide, and utterly ignored the evidence produced by the prisoner which tended to traverse the theory of the state. The evidence on behalf of the prisoner tended to show that at the time of the homicide he was suffering from a disease of the heart, which rendered him easily excited; that he was deeply intoxicated; that the deceased had made a remark to him concerning his wife of the vilest and most opprobrious character; that he had assaulted and knocked the prisoner down; and that all these things had conduced and contributed to put him into an excited and frenzied state of mind to such an extent that he had lost control of himself and consciousness of his actions. We do not say that the evidence established this theory of the prisoner, but we do say that it tended in that direction; and whether this evidence warranted the conclusion which the prisoner claimed for it was for the jury. It is to be observed that when the court comes to submit to the jury the question as to whether the prisoner at the time he shot Smiley knew that the killing was wrong ignores all the evidence of the prisoner on the subject, and picks out and holds up for the consideration of the jury only the claims of the state. After reciting the material facts proved by the state, the court said to the jury: "You have a right to consider all these facts in determining whether the defendant had knowledge that the act of shooting and killing Charles A. Smiley was wrong." The jury not only had the right to consider all the facts in evidence detailed by the court, but it had the right, and it was its sworn duty, to weigh and consider all the facts testified to by the defense in support of the theory of the prisoner. By this instruction the district judge practically said to the jury: "You consider the evidence that I have detailed to you, and omit all consideration of evidence not detailed." When the court undertook to detail in an instruction what evidence the jury might consider

in determining whether the prisoner knew at the time that the killing of Smiley was wrong, it was its duty to hold the scales of justice equally balanced; to give impartially to the jury the material evidence offered by the state to sustain its theory and the material evidence offered by the prisoner to sustain his theory. *Markel v. Moudy*, 11 Neb. 213; 7 N. W. 853; *Burley v. March*, 11 Neb. 291; 9 N. W. 48; *Kersenbrock v. Martin*, 12 Neb. 374; 11 N. W. 462; *Marion v. State*, 20 Neb. 233; 29 N. W. 911; *Long v. State*, 23 Neb. 33; 36 N. W. 310; *Lincoln v. Beckman*, 23 Neb. 677; 37 N. W. 593; *Carruth v. Harris*, 41 Neb. 789; 60 N. W. 106; *People v. Clarke* (Mich.), 62 N. W. 1117. In this last case it was said that an instruction in which the strong points of the evidence for the state were brought out while the evidence for the defendant was not so emphasized, and certain testimony which tended to negative material statements of the state's witness was not even referred to, was prejudicial to the defendant. The judgment of the district court is reversed, and the cause remanded.

Reversed and remanded.

Supreme Court of Nebraska.

Filed January 9, 1896.

MOREARTY v. STATE.

1. FORGERY—INFORMATION.

It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Roush v. State*, 51 N. W. 755, 34 Neb. 325, reaffirmed, and followed.

2. SAME—ORDER.

An order to deliver to bearer a specific article of personal property is within the definition of section 145 of our Criminal Code in relation to forgery, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind."

3. SAME.

The order or request upon which the charge in this case was founded to let bearer have a designated of personal property held to be the subject of forgery, though not addressed to any person by name; and where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility by its use to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms.

4. SAME—INSTRUCTION.

The giving of an instrument which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed.

Appeal from a judgment convicting plaintiff in error of forgery.

J. O. Yeiser, Martin Langdon, and Mahoney & Smyth, for plaintiff in error.

A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the state.

HARRISON, J.—As the result of a trial during the May, 1895, term of the district court in and for Douglas county the plaintiff in error was convicted of the crime of forgery, and was sentenced to be imprisoned for a term of one year in the penitentiary, and to pay a fine of \$100. To obtain a review of the proceedings in the district court, the plaintiff in error brings the cause to this court on petition in error.

The information filed contained two counts, the first of which charged as follows: "That on the 8th day of March, in the year of our Lord, 1894, Edward F. Morearty, late of the county of Douglass, aforesaid, in the county of Douglass, and state of Nebraska, aforesaid, then and there being in said county, then and there unlawfully and feloniously did forge and counterfeit a certain order and request for the delivery of goods in word and figures following, to wit: 'March 8, 1894,

Please let bearer have the trunk I put in your house at 5.30 this p. m. The bill is all paid, and everything O. K. Frank McKinzie, Constable,'—with intent to defraud.” The second count charged that the plaintiff uttered and published the order as true and genuine, with intent to defraud.

It is first argued that the information filed is insufficient, and did not contain a charge of a crime; that there are two defects apparent upon its face, one of which is a failure to allege an intent to defraud “any person or persons, body politic or corporate, or any military body organized under the laws of this state;” and the other that the instrument set out in the information by copy as forged was one on which no action could be predicated without an allegation of extraneous matter, and no such facts were pleaded. The first of these objections to the information is untenable. It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Roush v. State*, 34 Neb. 325; 51 N. W. 755; Cr. Code, § 417. It is claimed, as we have before stated, that the information was defective for the reasons that the instrument alleged to have been forged, which was set out in the information in full as the basis of the charge of forgery, was so imperfect or incomplete in its terms that it was not on its face apparently good and valid, and that it was necessary to a good information that there should have been averments of matters extrinsic to the instrument, explanatory of or extending its significance, and that no such matters were pleaded. In our statutes (see Cr. Code, § 145) there is stated in a long and quite comprehensive list a number of instruments which may be the subject of forgeries, and, among them, “any order or any warrant or request for the payment of money, or the delivery of goods and chattels of any kind.” The instrument declared upon in the information purported to be an order for the delivery of a trunk, and its false making, if sufficiently perfect in its terms, would be within the provisions of our Code relating to forgery.

The only further question is, was it apparently sufficient within itself to effect the purpose for which it was made? The instrument in this case was one which upon its face called for the delivery to the bearer of a specific article,—“the trunk I put in your house at 5.30 this p. m. The bill is all paid, and everything is O. K.” The signature attached was “Frank McKinzie, Constable.” While it is true it was not addressed to any person, yet it is apparent that it could be but for the one party with whom the trunk was left, or in whose house it was placed at 5.30 p. m. of the day the instrument was dated; and it seems quite clear that the order, if genuine, would have been explicit and clear enough for presentation to such party and demand for the delivery of the trunk, and to warrant him in honoring it. This being true, its making was forgery, and it was not necessary to plead any facts extrinsic to it in the information. If used, it was of a character to deprive some party of property rights. There was a possibility of some person being defrauded by its false making, and this was apparent from its face, and no averments of other and extrinsic matters were necessary in the complaint. Its meaning was sufficiently apparent, or could be gathered from its face, from the instrument alone; and it was not essential to a full charge that there should be statements of evidential matters in the pleadings. *Dixon v. State* (Tex. App.), 26 S. W. 500; *State v. Gullette* (Mo. Sup.), 26 S. W. 354; *Noakes v. People*, 25 N. Y. 380; *Hendricks v. State* (Tex. App.), 9 S. W. 555; *People v. Krummer*, 4 Parker, Cr R. 217. “But, if the meaning of the transaction can be sufficiently extracted from the instrument itself, it will not be necessary to state matters of evidence, so as to make out more fully the charge.” 1 Whart. Cr. Law, 740.

It was assigned that the court erred in giving instruction numbered five to the jury. This instruction reads as follows: “You are further instructed that the intent of a person is necessarily an operation of the mind, and is not ordinarily susceptible of direct proof, but may be determined by words spoken or acts done, or by both words and acts. Every human being of suffi-

cient age to understand the nature and consequence of his acts is presumed to intend the natural and probable consequences of his acts; and if you find from the evidence beyond a reasonable doubt that the trunk in question was in the possession of one W. H. McKinzie as constable, that he had deposited said trunk for safe-keeping temporarily with one Robinson, and that defendant, for the purpose of obtaining possession of said trunk from said Robinson, did unlawfully and fraudulently make, forge, and counterfeit the said instrument set out in the first count of the information, and did present said instrument to said Robinson, and did obtain thereby said trunk, you would have a right to infer, in the absence of proof to the contrary, that the defendant did unlawfully and falsely make and counterfeit said instrument with intent to defraud; and, if the other facts necessary to a conviction and these facts have been established by the evidence beyond a reasonable doubt, the defendant would be guilty upon the first count of the information, and you should convict him on said first count of the information. And if the facts necessary to a conviction as hereinbefore explained to you, upon the second count of the information, have been established by the evidence beyond a reasonable doubt, and you further find from the evidence beyond a reasonable doubt that defendant uttered or passed said instrument described in said second count of the information for the purpose of obtaining the trunk in question from said Robinson, you would be authorized in concluding that he uttered and published said instrument with the intent to defraud some person or persons." And the objection urged against it is that it submitted to the jury, in both its first and second paragraphs, whether the trunk was in possession of W. H. McKinzie as constable; that this was error, for the reason that there was no evidence introduced of the fact of such possession. After a careful examination of all the testimony given on the trial, we feel forced to the conclusion that this position is a correct one. The evidence does disclose that one W. H. McKinzie (or Washington McKinzie) was a constable in Douglas county, and that he took possession of the trunk in

question; that he took it from Birdie Mann, on Ninth street, in the city of Omaha; that he had a writ of replevin at the time he took the trunk; that he left the trunk at the house or store of one Robinson, where Morearty found it when he sought or obtained it by means of the instrument set out in the information. But it nowhere appears, nor do we think it can be fairly inferred from what is shown, that McKinzie assumed possession of the trunk as constable, or by virtue of the writ of replevin, or that he held such possession as such officer or under such writ of replevin or any other writ or process, or that either his taking or holding possession of the trunk was referable in any manner or to any degree to his duties or position officially, or by virtue of any replevin or other writ and its service as an officer. The use of the alleged forged order, judging from the intent and possibility of its defrauding any one, which, in the manner of its pleading, must be extracted from the instrument itself, could but result injuriously, if at all, to prejudice the rights of McKinzie to the possession of the trunk as constable; and, there being no right of possession, as such officer, shown in him, no evidence to support a finding of such fact, if made, it was error to submit the question to the jury, and prejudicial, as the intent of the crime charged in the information was to violate the rights of the officer. *Williams v. State* (filed this term), 65 N. W. 783.

There are some other assignments of error argued in the briefs, but we do not deem it necessary to enter into a discussion of them at the present time. It follows from the views expressed herein that the judgment of the district court must be reversed, and the cause remanded.

Reversed and remanded.

NORVAL, J.—I concur in the result, expressing no opinion upon the sufficiency of the information.

Supreme Court of Nebraska.

Filed January 9, 1896.

KORTH v. STATE.

1. CRIMINAL LAW—APPEAL.

Affidavits presented as evidence on a hearing in proceedings in a case in the district court will not be examined in this court unless made of the record by being embodied in a bill of exceptions.

2. SAME—RECORD.

When an application for discharge is made by a party charged with the commission of a crime for the reasons stated in section 391, Criminal Code, that three or more terms of court have elapsed since the one at which the information was filed against him, without his being brought to trial, and the delay has not happened on his application, or been occasioned by want of time to try it, the last two stated facts must appear affirmatively in the record by showing made, if not otherwise. In an examination by this court to determine the propriety of the action of the district court in overruling such application they will not be presumed, but the presumption that the court proceeded regularly and without error will prevail.

3. SAME—COUNTY ATTORNEY.

The provisions of section 21, chapter 7, Comp. St. 1895, as follows: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six of this act (section 20, this chapter),"—held applicable to the prosecution of offenses by information, established by the act of 1885 (Comp. St. 1895, c. 14, art. 1, § 69, subd. 33), and to warrant or authorize the trial court to appoint an attorney to perform the duties required of the county attorney in any particular case being prosecuted under the law in regard to prosecutions for offenses by information, whenever the conditions exist as stated in section 21, chapter 7, herein quoted; and that the enactment allowing such appointment is not in conflict with the provisions of section 10 of the bill of rights in the portion wherein it refers to the legislature providing by law for holding persons to answer for criminal offenses on information of a public prosecutor.

4. SAME—WAIVER.

In a criminal case "the accused shall be taken to have waived all defects which may be excepted to by a motion to quash or a plea in abatement by demurring to an indictment or pleading in bar or the general issue." See Criminal Code, § 444. And if a plea to the general issue has been entered, and has not, on leave obtained, been withdrawn, a plea in abatement need not be entered.

5. SAME—TRANSCRIPT.

Where a transcript of the proceedings at the preliminary examination, and the information upon which such examination was had, were lost or mislaid from the files of the district court, an order for the substitution of another transcript of such record and copy of the information was proper, and not erroneous.

6. SAME—PRELIMINARY EXAMINATION.

The record of the proceedings in the examining court discloses that a complaint was filed, which contained a charge of the crime for which plaintiff in error was tried in the district court, and that he was arraigned thereupon, and waived examination. Held sufficient to show fulfillment of the requirements of section 585 of the Criminal Code in regard to preliminary examination.

7. SAME—INDICTMENT.

A number of separate and distinct felonies, all of which may be tried in the same manner, which are of the same general character, require for their proof evidence of the same kind, and the punishment of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial for all of such counts at the same time. The question of whether the state will be required to elect between the several counts if a motion is made by defendant that it be so required will rest in the sound discretion of the trial court, and, unless it appears that there has been an abuse of such discretion in overruling the motion it will not be available as error.

8. SAME—ELECTION.

In the case at bar the defendant was charged with embezzlement of the funds of a county while he was its treasurer, in an information containing several counts charging several and distinct embezzlement. He made a motion that the state be required to elect upon which of the several counts of the information it would prosecute him. The trial court withheld its ruling upon this motion until the close of the introduction of the state's testimony in chief, at which time the motion was sustained, and the state required to elect under which count of the complaint it would further proceed. Held, so far as the record discloses, there was no abuse of discretion in the action of the trial court.

9. SAME—INSTRUCTION.

It is not error to refuse to give an instruction when the main purpose sought to be effected by giving the instruction is clearly and fully embraced in and accomplished by other instructions, read to the jury, and it appears that no prejudice could have resulted to the rights of the complaining party by reason of such refusal.

10. SAME—STATUTES—REPEAL.

The act of the legislature of 1891 entitled "An act to provide for the depositing of state and county funds in banks" (Sess. Laws 1891, p. 347, c. 50) did not repeal so much of section 124 of the Criminal Code as is in relation to loaning county funds, and constitutes such loaning by an officer intrusted with its care and disbursement an embezzlement.

'Appeal from a judgment convicting plaintiff in error of embezzlement of public money.

H. C. Brome, Douglas Cones, and Barnes & Tyler, for plaintiff in error.

A. S. Churchill, Atty. Gen., and George A. Day, Dep. Atty. Gen., for the state.

HARRISON, J.—On December 15, 1891, an information was filed in the district court of Pierce county charging the plaintiff in error with the crime of embezzlement of public money, the property of such county, during the time he was treasurer thereof. On the 27th day of April, 1893, the application of plaintiff in error for a change of venue was granted, and the case was sent to Antelope county for trial. December 23, 1893, as a result of a trial, a verdict of guilty was rendered and entered, and, after motions for new trial and in arrest of judgment were heard and overruled, plaintiff in error was sentenced to a term of three years' imprisonment in the penitentiary. He has presented the cause to this court on petition in error. A bill of exceptions was filed, which was attacked on the part of the state by a motion to quash, which was sustained, as a consequence of which action we will be confined in our examination of the points raised on the application by the assignments of error to those

which can be discussed and determined without reference to the bill of exceptions.

One assignment of error refers to alleged misconduct of the court during the trial. The facts on which this assignment depends for its force were made a part of the record by affidavits in which they were set out. There were also counter affidavits in relation to the same matter filed for the state. Affidavits of the character of these, in order that the subjects embraced in them may be available in the presentation of questions in this court, must be preserved in a bill of exceptions; and if it was done in this case the bill of exceptions has been quashed, consequently the facts with relation to this objection are not properly before this court for examination. It follows that the assignment of error is unsupported, and must be overruled.

During the pendency of the cause, and before trial, the plaintiff in error made application by motion to be discharged on the ground that four terms of court succeeding the one during which the information under which he was prosecuted was filed had passed without a trial being accorded him, and that the delay or failure to bring the case to trial was not occasioned by any application or act of his, or by lack of time. Affidavits were filed in support of the motion to show that the trial of the case had not been delayed on application of the plaintiff in error, or for want of time, and on the part of the state mainly directed to an attempt to show the opposite to be true as to both facts; but the affidavits are not presented to this court by a bill of exceptions, and we cannot examine or consider them. The record before us does not disclose that the delay in the trial of the cause was caused in any manner by the plaintiff in error, or for lack of time at any term of the court to try it; nor does the contrary appear. For the purpose of the motion, doubtless it devolved upon the plaintiff in error, if not disclosed by the record, to show that there had been no postponement of the trial of the cause on his application, or that the delay was not occasioned by want of time to try it during the third term of court held subsequent to the term at which the information was filed. In the absence of the appearance of these

facts in the record, or a showing in regard to them, we think the presumption must prevail that the court proceeded regularly, and without error, and properly held and placed the plaintiff in error upon trial at the time it did; or it will not be presumed that the trial court, in the face of the existence or a showing of the existence of the facts which entitled the plaintiff in error to his discharge under the provisions of section 391 of the Criminal Code, ignored his constitutional right to a speedy trial (see Bill of Rights art 1, § 11), and improperly held and tried him for the crime with which he was charged.

Another contention is that the information filed in the case was not made or filed by any officer or person authorized by law. The information was made and filed by W. W. Quivey, who was not the county attorney of Pierce county at the time, and whose authority, if he possessed any, was derived from an order of the court in this particular case, which was as follows: "Now, on this 14th day of December, 1891, the same being a judicial day of the regular December, 1891, term of said court, this cause came on for hearing, and, the county attorney failing to appear and prosecute this case, and it appearing to the court that said county attorney is disqualified from prosecuting on behalf of the state of Nebraska by reason of his having been retained as counsel for the defendant, Carl Korth, prior to his election and qualification as county attorney, aforesaid, and it further appearing that said county attorney has no deputy qualified to appear for him in this case: It is therefore ordered by the court that W. W. Quivey is hereby ordered by said court to act as county attorney in this case, and that John S. Robinson is hereby duly appointed by the court to assist the said W. W. Quivey as county attorney in the prosecution of this case." Pursuant to this order, W. W. Quivey acted in all particulars as county attorney in this case. It is argued that under the provisions of our constitution (Bill of Rights), article 1, § 10: "That no person shall be held to answer for a criminal offense * * * unless on a presentment or indictment of a grand jury; provided that the legislature may by law provide for holding persons to answer for criminal offenses

on information of a public prosecutor; and may by law, abolish, limit, change, amend or otherwise regulate the grand jury system;" and the act of 1885, establishing prosecution of crimes by information, in one section (Cr. Code, § 579) of which it is stated: "All informations shall be filed during term in the court having jurisdiction of the offense specified therein, by the prosecuting attorney of the proper county, as informant,"—the county attorney is indicted as the person, and the only one, who can make and file an information in a prosecution by such proceeding without the intervention and finding of a grand jury; that the several district judges or courts of the state possess no right to and cannot appoint any one to file information in the place and stead of the county attorney. The legislature which passed the act authorizing prosecutions by information also passed an act in relation to county attorneys and their duties, etc. In one section (see Comp. St. 1895, c. 7, § 21) it was provided: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six (6) of this act." This, doubtless, gave the trial court power to make the appointment, and the person designated in its order possessed the authority to act in this particular case in all matters or questions arising therein which would probably have fallen within the province of the county attorney to examine and determine had he been present, and not disqualified to act. Nor do we think in this holding we do any violence to the proper enforcement of the provisions of the constitution and the law of 1885 invoked by the plaintiff in error, when given their true and practical significance. It is urged that the power to thus appoint an attorney to prosecute a cause against a person accused of crime is liable to be abused, and some one assigned the duty who is incompetent, or who will not fairly conduct the case, but may, in the interest of private parties, who desire an exceedingly vigorous prosecution

to be made, allow the criminal case to become the means of satisfying personal spite or the gratification of malicious purpose, and the party charged with crime be persecuted, rather than prosecuted as the law contemplates. This contention involves the assumption that the person who has been so fortunate as to be elevated by a majority of the votes of the electors of the judicial district to the high and honorable position of district judge will lend himself or be hoodwinked into seeming to countenance the scheme depicted in this argument, and the member of the bar appointed will be disreputable, and ready to disregard his oath, and act in an unprofessional manner. With this view we cannot agree. It must rather be presumed that both judge and attorney will perform their respective duties fairly, impartially, and honorably. It is possible that, in exceptional cases, what is claimed in the argument may happen; but, if so, it may always be remedied in the same or a higher court.

A plea in abatement was filed in behalf of plaintiff in error, and on motion of the state was stricken from the files, or practically overruled. This action of the court is assigned as error. The plea was founded upon the same matters as presented in the motion to discharge the plaintiff, and which we have hereinbefore discussed. Whether it was proper practice for the court to strike the plea from the record, or whether the subjects set forth in the plea were such as may properly be presented by the plea in abatement, we need not stop to consider, for on December 17, 1891, plaintiff in error had been arraigned and pleaded generally, and on the date the plea in abatement was filed the plea to the general issue was still of record and not withdrawn. This being true, all defects which might have been excepted to by plea in abatement were waived. See Cr. Code, § 444. And if it was error (which we do not now decide) for the court to strike the plea from the files, it could not prejudice the rights of plaintiff in error, as at the time the plea could not have been of any avail.

Another objection is that at the time the plaintiff in error was placed on trial the record did not show that he had ever been accorded a preliminary examination for the crime with which

he was charged in the trial court. This objection was made in the district court at the inception of the introduction of testimony and was overruled by the court. This is assigned for error. The prosecution was instituted in the county court of Pierce county, and after it reached the district court an information was filed. Afterwards, during the pendency of the cause in Pierce county, an order was made in which it was recited that the transcript of the record of the hearing before the county judge, and some of the accompanying papers, and particularly the information filed in the examining court, had been lost, and that a new transcript and copy of the information be substituted. A change of venue was applied for and granted, and the case was transferred to Antelope county, and the order of substitution was not fulfilled until after the removal of the cause to Antelope county, and the commencement of the trial; but the transcript then filed disclosed that the plaintiff in error waived an examination in the county court. This being true, there was no prejudice to his rights in proceeding with the trial at a time when the transcript of the hearing in the examining court was not in the record by reason of being lost or mislaid, or in allowing another transcript and copy of such information to be substituted.

Another alleged error is that the court erred in refusing to require the state to elect on which count of the information the plaintiff in error should be tried. There were five counts in the information, as to the fourth of which a nolle prosequi was entered before the cause came to trial. A motion was filed at or about the time of trial to require the state to elect upon which count of the information it would proceed. Upon this the court withheld its ruling until such time as the evidence for the state should all be introduced, and, when the trial had progressed to the stage indicated, sustained the motion, and an election was accordingly made at that time by the state. It is urged that the court erred in not sustaining it at the time when made. After the fourth count of the complaint was ignored, there still remained four counts in which separate and distinct felonies were charged; but each was a charge of embezzlement of public money,

the money of the county of which the plaintiff in error was treasurer. The offenses were all of the same general character, required for their proof the same quality of testimony, the same manner of trial and mode of punishment, and it was proper to try the plaintiff in error upon the several counts at the same time. Whether there should be an election as to the particular count was a question within the discretion of the trial court. This, in the case at bar, was exercised by allowing the prosecution to introduce its testimony, and then requiring it to elect, and we cannot discover from the record that in this there was any abuse of discretion. As to the main proposition, see 1 Bish. Cr. Proc. (3d. Ed.) §§ 424, 450, 451; Whart. Cr. Pl. § 285 et seq.; Com. v. Jacobs (Mass.), 25 N. E. 463; Pointer v. U. S., 14 Sup. Ct. 410; State v. Hodges (Kan. Sup.), 26 Pac. 676; 4 Am. & Eng. Law, 754-756; Roberts v. People (Colo. Sup.), 17 Pac. 637.

It is claimed the court erred in refusing to give instruction numbered 2 requested by plaintiff in error. This instruction was as follows: "You are instructed that in law the words 'prima facie' mean 'at the first blush,' 'on the first appearance of' such evidence, in a criminal case are not sufficient to warrant a conviction. The rule obtains in all criminal prosecutions that the evidence must be sufficient to convince the jury of the defendant's guilt, and of every element of the transaction going to establish his guilt beyond all reasonable doubt." Instruction numbered one given at the request of plaintiff in error reads: "You are instructed that the statutes of this state provide that any failure or refusal to pay over public money, or any part thereof, by any officer or other person charged with the collection, receipt, transfer, disbursement, or safe-keeping of the public money, or any part thereof, whether belonging to the state or to any county or precinct or school district or organized city or incorporated village in this state, or any other public money whatsoever, * * * shall be taken and held as prima facie evidence of embezzlement. Nevertheless you are instructed that the state must prove to you beyond all reasonable doubt that the defendant converted the public moneys of Pierce county to his own use, with

intent to defraud the said county out of the same. And if you have any reasonable doubt of such fact you will give the defendant the benefit of such doubt, and find him not guilty." The argument is that, inasmuch as the court thought fit to give instruction numbered one, then, to convey to the jury a proper understanding of its terms, and in particular the words "prima facie evidence," No. 2 should have been given. It will be noticed that in the concluding portion of No. 1 the jury is informed that, notwithstanding all that may have been stated in the preceding portion of the instruction, the proof, to be sufficient to convict, must be beyond a reasonable doubt; and in an instruction numbered three, asked by plaintiff in error, and given, this feature of the requirement in regard to the proof was stated in strong terms, and in instruction numbered three, given by the court on its motion, the above rule was clearly and positively announced, and it also appears in other portions of the instructions. In view of all this, we are satisfied that no prejudice could have resulted to the rights of plaintiff in error from the refusal of the court to give the instruction indicated in the assignment of error.

The giving of each of the instructions numbered one and two of the charge to the jury given by the court on its own motion is assigned as error. The main objection raised is claimed to be applicable to both, and we will so examine it. No. 1 of these instructions was a copy of the section of the Criminal Code defining the crime of embezzlement of public money under which this prosecution was instituted, and No. 2 quoted the first count of the information, and stated that it contained a charge against the plaintiff in error of a violation of the section set forth in instruction numbered one. It is alleged that the act of the legislature of 1891 in relation to depositing the county funds in banks repealed at least so much of the section defining the crime of embezzlement as refers to the loaning of such funds, and that these instructions were erroneous in not noticing the act of 1891, and its claimed effect upon the laws of embezzlement, and in not informing the jury that it should not consider any evidence in relation to loaning the county funds, as bearing upon the issue

which was being tried. To the proposition that the act of 1891 repealed the portion of the law of embezzlement in regard to the loaning of funds of a county we do not agree. The act of 1891 was entitled "An act to provide for the depositing of state and county funds in banks" (Sess. Laws 1891, p. 347, c. 50), and in its text it is confined to providing for the deposit of such funds, for safe-keeping, in banks, under certain requirements as to bonds being furnished for the security of such funds and other details; and in each and every detail it appears that it is for the county and its benefit that such deposits are to be made, the treasurer acting in each and every instance for and in behalf of the county, and as prescribed by law, and not of his own volition. If he refuse to perform any of the statutory requirements, he is liable to punishment therefor; and if he deposit the money of the county, under the direction of the law, in a bank which has given bond, he is not liable for any money so deposited. It is true, there is a section of the act referred to which defines as a crime the making of any profit whatever, directly or indirectly, by the county treasurer, out of any money belonging to the county, in his charge, by loaning it. It is the fact that a profit is derived from it that subjects him to punishment, and not the fact of the loaning. The deposit of the funds which the treasurer is called upon to make by the law in question is, in effect, a deposit by the county. The treasurer has only to place it where directed, and draw it when needed for county purposes. In the law defining embezzlement the loaning by the treasurer, either with or without interest, is evidence of a conversion of the funds to his own use, and is to be punished as an embezzlement. Clearly, evidence of a deposit of the funds such as is contemplated by the act of 1891 would not be competent, and could not be received in a prosecution for embezzlement of county funds by the treasurer, as tending to show a loan. Nor does the fact that an attempt has been therein made to provide a punishment of the treasurer for making a profit out of the public money by loaning it in any manner or degree conflict with or abridge the right or power of the state to punish the act of loaning the funds

by the treasurer as an embezzlement. We are clearly of the opinion that the act of 1891 referred to did not work a repeal of the portion of the law in relation to the loaning of county funds by officers intrusted with their care and charged with their disbursement, and which constitutes such loaning a conversion and embezzlement of the funds loaned.

The judgment of the district court is affirmed.

Supreme Court of Nebraska.

Filed January 9, 1896.

COOLEY v. STATE.

COMPLAINT—CONSTRUCTIVE CONTEMPT.

A complaint is insufficient as the foundation of proceedings for constructive contempt which fails to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder or embarrass it in the administration of justice.

Plaintiff in error brings error to review a judgment holding him guilty of contempt.

D. Van Etten, for plaintiff in error.

A. S. Churchill, Atty. Gen., and W. W. Slabaugh, for the State.

POST, C. J.—This is a petition in error to review a judgment of the district court of Douglas county whereby the plaintiff in error was adjudged guilty of contempt of court. The basis of the prosecution below is the following order, entered by the district judge on his own motion: “State of Nebraska v. Julius S. Cooley and Theodore Galligher. It now appearing to the court that one Julius S. Cooley has used fraudulent means and imposed upon Charles J. Karbach in the obtaining of a certain affidavit of the

said Charles J. Karbach recently filed in case entitled George A. Hoagland v. Emma L. Van Etten et al., Doc. X No. 375 of this court; and it further appearing to the court that one Theodore Galligher has used fraudulent means and imposed upon George H. Fitchett and E. C. Garvin, respectively, in the obtaining of certain affidavits of the said Garvin and Fitchett, recently filed in case entitled George A. Hoagland v. Emma L. Van Etten et al., Doc. X No. 375 of this court; it further appearing that the said Julius S. Cooley and Theodore Galligher procured the said affidavits of the parties as above set forth knowing and intending that said affidavits were to be filed in this court, to be used upon the hearing of said cause, to wit, George A. Hoagland v. Emma L. Van Etten, and that the said Galligher and Cooley intended thereby to impose upon this court: It is therefore ordered that a capias be issued forthwith to the sheriff of Douglas county, Nebraska, commanding him to bring the said Julius S. Cooley and Theodore Galligher before this court at 9:30 o'clock Wednesday morning next, to show cause why they, and each of them, should not be punished for contempt of this court. G. W. Ambrose, Judge." Upon the entry of the foregoing order, a capias was issued, by virtue of which the plaintiff in error was arrested, and, at a subsequent day of the term, was adjudged guilty as charged in said order, and sentenced to imprisonment in the county jail for the period of ten days, and to pay a fine of fifty dollars, together with the costs of the prosecution.

The question of the sufficiency of the said order was raised at every stage of the proceeding, and also by the petition in error. It has been frequently said that the proceeding for contempt under our system is in the nature of a criminal prosecution, and that the same degree of certainty is required in stating the offense as in prosecutions under the Criminal Code. Gandy v. State, 13 Neb. 445; 14 N. W. 143; Boyd v. State, 19 Neb. 128; 26 N. W. 925; Johnson v. Bouton, 35 Neb. 903; 53 N. W. 995; Percival v. State, 45 Neb. 741; 64 N. W. 221; Hawes v. State, 46 Neb. 149; 64 N. W. 699. That rule is especially applicable to acts which, although not committed in the presence of the court,

tend to embarrass or prevent the orderly administration of justice, and which are known as "constructive contempts." In *Grandy v. State*, supra, it is said: "The proceeding against a party for constructive contempt must be commenced by an information under oath, especially stating the facts complained of. An attachment may then be issued, or order to show cause." In that case the information which was prepared and filed by the district attorney after describing a certain cause then on trial, to which the defendant therein was a party, alleged that the said defendant "did willfully attempt to obstruct the proceedings and hinder the due administration of justice in said suit, then and there depending and on trial, as aforesaid, before said district court, in this, to wit, by attempting to procure one George A. Abbott, Jerry Ackerman, and other persons, whose names are to this affiant and informant unknown, to unlawfully seek, strive, and attempt to corrupt and influence the jurors, to wit, * * * in their action, judgment, and decision * * * in said suit." In the opinion reversing the judgment of conviction, Maxwell, J., says: "In the case at bar there is not a single fact alleged showing an attempt on the part of the defendant to improperly influence jurors; that is, there is no statement of what he did. The information therefore fails to state an offense." In *State v. Henthorn*, 46 Kan. 613; 26 Pac. 937, the court say: "It is error to issue an attachment, warrant, or order of arrest for an alleged constructive contempt, without an affidavit or information containing a statement of the facts constituting the alleged contempt having first been filed with the court." See, also, to the same effect, *In re Holt* (N. J. Sup.), 27 Atl. 909; *Wilson v. Territory*, 1 Wyo. 155; *In re Daves*, 81 N. C. 72; *Ex parte Wright*, 65 Ind. 508; *Rap. Contempt*, 43.

We must not be understood as intimating that proceedings for constructive contempt may not be instituted by the court or judge. On the other hand, it is the right, if not, indeed, the duty, of the tribunal whose power is defined, or whose process is obstructed, to take notice of that fact without waiting for an informant, who is usually more interested in asserting his personal rights than in the vindication of the court. It is probable, too that an order

like that entered in this case is a sufficient foundation for the proceedings. But, to have that effect, it must contain the allegation essential to confer jurisdiction in a prosecution by affidavit or complaint. When tested by that rule, the order mentioned is clearly insufficient. If this conviction can be sustained, it must be upon the allegation that the accused "has used fraudulent means and imposed upon one Charles J. Karbach in the obtaining of a certain affidavit." Here, as in *Grandy v. State*, there is alleged no fact from which it can be found or inferred, as a matter of law, that the act of the accused was a fraud upon Karbach, the affiant named, or that its effect was to impose upon or embarrass the court in the administration of justice. Such a statement would be indefensible in an action for relief on the ground of fraud, not to mention a criminal prosecution.

The judgment is reversed, and the prosecution dismissed.

Supreme Court of Appeals of West Virginia,

Filed December 7, 1895.

STATE v. DOUGLASS.

1. **INDICTMENT—HOMICIDE.**

An indictment for homicide, which is in the form allowed by section 1, chapter 144 of Code, will not be held bad.

2. **CRIMINAL LAW—VENUE.**

The venue will not be changed for the mere belief of the party or his witnesses that he cannot have a fair trial in the county; facts and circumstances must appear satisfying the court.

3. **SAME—JURORS.**

Jurors, who say that they have made up their opinions adverse to defendant from the rumor of the county, etc., and state definitely that they have no bias or prejudice against defendant but that they can have their minds blank and free from such opinions, and can and will give the prisoner a fair and impartial trial, uninfluenced by such opinions, according to the evidence, are competent.

Appeal from a judgment convicting defendant of murder.

J. W. Arbuckle and W. P. Rucker, for plaintiff in error.

T. S. Riley, Atty. Gen., for the State.

BRANNON, J.—This is a writ of error brought by Kenos Douglass to reverse a sentence of imprisonment for life in the penitentiary imposed upon him by the circuit court of the county of Greenbrier for the murder of Thomas Reed on Christmas night, 1893. Counsel for the prisoner asks us to hold bad the indictment, which is in the form allowed by section 1 of chapter 144 of the Code; the particular defect suggested being the omission to charge the homicide as having been done with premeditation, as one of the essential elements of murder in the first degree. As was said in Baker's case, 33 W. Va. 330; 10 S. E. 639, we regard the indictment good under several decisions there mentioned, and will not reopen its discussion. It has been so long used and so often approved that the matter ought to have rest.

The refusal to allow a change of venue is relied on as error. The statute requires the accused to show good cause for it. This means that he must show it to the satisfaction of the court. *State v. Greer*, 22 W. Va. 800. To maintain this motion numerous affidavits were filed,—all, I may say, alike in substance,—stating that the affiants had heard the case much talked about in the county, and that there was a strong prejudice against Douglass, and that, in the opinion of affiants, a fair and impartial trial could not be had in Greenbrier county. Are these affidavits taken alone, without reference to the counter affidavits filed by the state, sufficient to show that the circuit court abused the discretion lodged with it? They show what? First, That the case was much talked about. This is only a basis of opinion that prejudice existed. Second. That there was prejudice, which could only be matter of opinion. Third. That in the opinion of affiants a fair trial could not be had. Now, this all amounts but to an expression of opinion that a fair trial could not be had. There may be public discussion of a case. There always is of murder cases. There may be prejudice,—generally is; but it is so prevalent and widespread that, in spite of the safeguards which the law throws around trials, it may—there is serious

danger that it may—prevent a fair trial? No facts are given affording a basis of judgment as to whether such trial can be had. Opinions differ so widely. They spring, with different men, from so many different theories, conjecture, bias, partisanship, or solid ground. There must be facts and circumstances so that legal deductions can be made. In *Wormsley's Case*, 10 Grat. 658, the evidence showed much more than here, and was held insufficient, and the rule stated that the prisoner's affidavit, alone, of a fear or belief that he could not get a fair trial was insufficient, and that there must be independent testimony to show facts making it appear probable, at least, that his fears and belief are well founded. 1 Bish. New Cr. Proc. § 71, cl. 5, correctly states the rule: "The venue will not be changed for the mere belief of the party or his witnesses that he cannot have a fair trial in the county. Facts and circumstances must appear satisfying the court." So long ago as 1817 the Virginia general court adopted a general rule that in future, in all motions to change the venue, the petition and affidavit "shall set forth the particular facts from which the petitioner is induced to believe that he cannot have a fair trial in that county." 2 Va. Cas. 88. In *Territory v. Egan*, 3 Dak. 119; 13 N. W. 568, it is held that the affidavits "must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The court must be satisfied from the facts sworn to, and not from the conclusions to which the defendant and his witnesses may depose." In *Salem v. State*, 89 Ala. 56; 8 South. 66, it is held that opinions of witnesses pro or con are worthless, unless supported by sufficient reasons, testified to as facts. The same rulings will be found in *People v. Bodine*, 7 Hill, 147; *State v. Burris*, 4 Har. (Del.) 582; *People v. Yoakum*, 53 Cal. 566. It is clear that the prisoner's showing did not entitle him to a change of venue. But affidavits were filed by the state denying the existence of a prejudice against Douglass to an extent at all militating against a fair trial, stating that the excitement incident to the murder had abated, as also the feeling against him, and that he could, in the opinion of affiants, have a fair and im-

partial trial, and that those who made the affidavits for the prisoner were residents of the immediate vicinity of the place of the homicide, and even there sentiment was divided, as the prisoner had partisans there, but that other sections of the large county of Greenbrier, composed of eight districts, were unaffected by prejudice. These affidavits conveyed the opinion of an ex-sheriff, the sheriff and two deputies, and the prosecuting attorney, who were extensively acquainted with all parts of the county.

Another point made in behalf of the accused is that the jury included improper jurors. These jurors did say that they had made up opinions adverse to the prisoner; but their opinions were not from having heard evidence,—not even from conversations with witnesses in the case,—but from the talk or rumor of the county, or from reading the Greenbrier Independent, and each and all stated definitely that they had no bias or prejudice against Douglass, that they could have their minds blank and free from such opinions, and could and would give the prisoner a fair and impartial trial, uninfluenced by such opinions, according to the evidence. This court has so often considered the question of the competency of jurors that it would be a sheer waste of time to rediscuss the subject here. Unless we upturn numerous decisions heretofore made, these jurors were free from legal exceptions. *State v. Baker*, 33 W. Va. 319; 10 S. E. 639, and cases cited.

Ought the circuit court to have given the prisoner a new trial because the verdict was unsustainable by the evidence? I will not detail the pages of evidence. Thomas Reed had a chopping Christmas day, and invited his friends to his cabin home in the mountains to participate in plays usual among the mountaineers on such occasions. Kenos Douglass had not helped at the chopping, and was not invited. He organized a company of five, he being one, and went to Reed's party, several miles away. He commanded the company. He openly exhibited a pistol along the way. The whole evidence shows that he, at least, designed to create disturbance at the party and carry things on in his own way. He and his companions were kindly invited in at Reed's. Scarcely had he entered than he started a fuss with a younger

boy, Creed Reed, a brother of Thomas Reed, by boisterous, insulting language, laying his hand on his breast, and pushing him back. Another brother, Johnson Reed, remonstrated with Douglass, saying, "Kenos, that is my brother, and you must not hurt him; he is too young," and he replied that he had things to go on as he said, swearing as he said this. Then he and a companion started a play of their own, represented as rough, which Thomas Reed did not like, but let them finish it, and then said, "You must go out of my house, if you please." Evidence shows that Douglass used both profane and obscene language in the company of ladies and gentlemen. Thomas Reed did nothing more during this attack on his brother than to say to Douglass he wanted no swearing, and Douglass said he would do as he darned pleased. Then Douglass drew a pistol, and defiantly and threateningly snapped it two or three times, pointing it at a bed in which two children were sleeping, and a few moments later fired the pistol into the loose board ceiling. Not an insulting word had been given him by the deceased. When the pistol was fired a good many left the room, and then Douglass walked out the open door, and Thomas Reed, without weapon or assault or threat, but evidently to close the door (it may be, fearful that Douglass would fire into the house), followed him across the small room, and, it may be, but is not certain, put his hand on Douglass' shoulder just as he went out of the door, but surely used no violence, and then closed the door, when, instantly, as the door was closed, a shot was fired through the panel door and penetrated Reed's body, causing his death next day. Who fired this deadly shot? No one else had had the slightest word out of the way with Reed. He was the only one seen with the deadly pistol. Just as the door closed, he on its outside, Reed on its inside, before either had time to get away, came the shot. Some say he had the pistol still in hand as he passed the door sill. From whose pistol this deadly bullet? Were there no other evidence, these circumstances would be full proof to reasonable men that he fired the fatal bullet. He was intent on mischief, as his conduct shows. He was intent, it would seem, on taking Reed's life. He was

afraid to fire in the room before all eyes, and thought it safer to fire from the outside; but he was careful to fire at once, before Reed would leave the knob of the door, and pointed his pistol at just the proper place to kill Reed. He was so close that the powder burnt the door. Reed's dying declarations to his father, Elijah Reed, accuse Douglass. His father was at his bedside when the wounded young man said, "Pa, I don't want you to grieve for me; I am bound to die," showing the deadly wound. The father asked him, "Tom, do you know who did it?" and he was answered that it was hard for a man to be shot in his own home, trying to keep order in his own house. So strong were the circumstances, that Reed knew whose finger pulled the trigger. There was no room for a mistake on his part. The circumstances were too close and forceful. A witness for the defense, Robert Taylor, says he heard a woman's voice outside the door say, "Lordy, Kenos; don't shoot," and he replied, "Damned if I don't," and then the shot. Richard Humes and Gordon Falconer say they saw Kenos Douglass fire that shot. Thomas and Miranda Cochran hear Douglass say that night that he would not have shot Reed if he had not shoved him from the door. Did Douglass go into the stricken man's house, like many others, to minister what comfort he might to him and his wailing wife? He did not. Did he go home and wait the coming of the officer of the law in the consciousness and courage of innocence? He did not. Whither did he flee? From home and the haunts of men to the recesses of the wildest mountains of the state, and in midwinter for five weeks lay in a laurel brake hiding from the eyes of man, never going to a human habitation, and there he was surprised while asleep by a vigilant officer of the law. As a jury has said he is guilty of murder in the first degree, we could not say otherwise, unless their finding be plainly, manifestly against or without evidence, so as to assault the conscience as a verdict of palpable injustice; but that verdict is sustained by abundant evidence. The jury showed mercy in not making Kenos Douglass pay the forfeit of his life for the life of Thomas Reed, under the law of the Bible. We would fain somewhat

palliate the enormity of this act by attributing it to haste and recklessness of intoxication, but I regret to believe that it is only a cruel, unprovoked murder of a man without fault, within the sacred precincts of his humble home, by one who invaded that home bent on mischief to some one there, certainly; bent, likely, on taking the life of Thomas Reed. Men intend what they do. I repeat that I would gladly attribute the act to intoxication; but while the use of liquor in Douglass' party is mentioned, it was before they came to Reed's and no one says that Douglass was to any extent intoxicated there. The signs point, as above stated, to sedate design. It appears he did not like the Reeds. He seems to have intended to break up and discredit the entertainment. He did so, as Thomas Reed said, when Douglass had so misbehaved, that they would have to close the play. A bad feature in this connection is that Sally Dancey stated on the stand that, on the 16th of December, at Trout Valley, Douglass, at a store, asked twice, before any one answered, where Tom Reed was, and she answered that he was out of town, when Douglass jumped up and ran towards the door, saying, "Boys, I am practicing for Christmas, and if you don't believe it," pulling back his coat, disclosed a strap around his shoulder. This witness said she could have seen what was on the strap, if she had been standing where Bernard McClung was. The defense calls from the night's shadow a humpbacked, limping old man, wearing a long overcoat, brings him to Reed's door just in the nick to make a point, and then the shot, and then this figure disappears back into the night. Whence and whither came and went he? No one knows. No one recognized him. Neither did the common-sense jury. That body must have regarded him as a thin, ethereal being, born of fiction, inspired by the superstition surrounding such a night tragedy, or as the child of perjury, but dematerializing under the light of common sense and truth. One witness makes this old man anxious to know the fate of his victim, by making him return towards Reed's and inquire as to his condition. This must be attributable to remorse and repentance. It could not be that he was returning to see if he was safe from suspicion,

as he had come and gone utterly unrecognized and unrecognizable. He was a myth. No doubt unfortunate Kenos Douglass would give the world, if he possessed it, to recall that deadly shot, and we can but feel pity for him, a young man less than thirty years of age, resting under the terrible doom of imprisonment within iron doors which will never open for him; but appeal courts cannot pardon these terrible crimes against life and organized society when a jury of the man's peers, who have looked him and his accusers in their faces, and fairly heard his cause, have pronounced him guilty. We therefore affirm the sentence.

Supreme Court of Ohio.

Filed January 21, 1896.

JONES v. STATE.

1. RAPE—INDICTMENT.

An indictment under section 6816, Revised Statutes, for carnally knowing a female child under fourteen years of age, need not aver that she is not the daughter or sister of the accused. Howard v. State, 11 Ohio St. 328, distinguishing.

2. SAME—EVIDENCE.

On the trial of the issues joined by the plea of not guilty, it is error to admit evidence whose only effect is to show that others believe the accused guilty.

3. SAME—WITNESS—CORROBORATION.

The recollection of a witness concerning a fact in issue cannot be corroborated by the contents of a memorandum made by himself, long after the circumstance, showing his recollection at a former date.

Appeal from judgment convicting plaintiff in error of rape.

Plaintiff in error was found guilty upon the following count: That he, "being then and there a male person of the age of eigh-

teen years and upward, did unlawfully and carnally know and abuse one Mary W., then and there being a female child under the age of fourteen years, to wit, of the age of thirteen years, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio." A motion for a new trial was overruled, and sentence of imprisonment in the penitentiary for three years, and the judgment was affirmed by the circuit court. Rulings of the trial court upon the admission of evidence are stated in the opinion.

SHAUCK, J.—The first contention of counsel for the plaintiff in error is that the indictment is fatally defective because it does not aver that Mary W. is, or that she is not, the sister or daughter of the accused. In support of that view they rely on *Howard v. State*, 11 Ohio St. 328. It was held that the crime of having "carnal knowledge of a daughter or sister forcibly and against her will" as defined in the fourth section of the act of March 7, 1835 (1 Swan & C. St. p. 404), and the crime of having "carnal knowledge of any other woman or female child than his daughter or sister, as aforesaid, forcibly and against her will," as defined in the fifth section of the same act, were distinct crimes, and not merely distinct grades of the same crime; and that in charging the latter crime, it was essential for the indictment to state that the woman or female child upon whom the offense was charged to have been committed was not the daughter or sister of the accused. The report contains only the conclusions of the court, but we suppose they were supported by the view that the indictment must contain a complete description of the offense; each of the sections referred to containing a complete description of an offense and providing a penalty therefor. But the statute governing the present case is found in sections 6816 and 6817 of the Revised Statutes. Section 6816 is as follows: "Whoever has carnal knowledge of a female person forcibly and against her will; or being eighteen years of age, carnally knows and abuses a female child under fourteen years of age without her consent, is guilty of rape." The crime described

in the latter clause of the section is that described in this indictment. To hold that the indictment must either aver or negative the supposed kinship would be to add to the requirements of the statute. The case cited can have no application to the present case, because of the change in the statutory description of the offense.

But counsel further contend that, since the former of the sections referred to contains no penalty, and since, for the purpose of ascertaining the penalty appropriate to the crime, reference must be had to section 6817, the same difficulty is met as in the former statute. Section 6817 provides: "A person convicted of rape upon his daughter or sister, or a female child under twelve years of age, shall be imprisoned in the penitentiary during life; and a person convicted of rape upon any other female shall be imprisoned in the penitentiary not more than twenty nor less than three years." The latter section contains no definition of the crime, but each of its clauses adopts the definition of the previous section. To the imposition of the severer penalty provided in the first clause of the latter section it is necessary that there be either kinship or the age of less than twelve years. To the proposition that no sentence could have been imposed upon a plea of guilty to this indictment, it is a sufficient answer that, notwithstanding the omission from the indictment of either of the circumstances justifying the severer penalty provided by the first clause of section 6817, it contains the general description of the crime for which the penalty is provided in the second clause of the latter section; that is, upon one "convicted of rape upon any other female." Under the present statute there are distinct grades of the same crime. We do not agree with counsel for the state, that upon a plea of guilty to an indictment of this character the court might hear evidence to enable it to determine whether the penalty of the first clause of section 6817 or that of the second clause would be appropriate; for, upon the question of kinship or age, contemplated by the former clause, the defendant would be entitled to the verdict of a jury. In that case the affirmative averment of kinship or age

would be necessary. In this case no negative averment is necessary, because without it there is a complete description of an offense for which the penalty imposed in this case is provided.

On the trial, the mother of the child was permitted to testify, in answer to questions by counsel for the state, and against the objections of the accused, that after the commission of the alleged offense, and before the arrest, she went to the residence of Jones, and, not finding him at home, inquired of his wife concerning him; that Mrs. Jones told her where he was, and then declared to her, in substance, that if the friends of the child did not send him to the penitentiary she would. If the belief of Mrs. Jones in the guilt or innocence of her husband were material, that declaration, if made, would have justified the inference that she believed him guilty, though it would have been impossible to learn the sources or character of the information upon which her belief was founded. But as the object of the trial was to ascertain whether competent evidence would create such belief in the minds of the jurors, her belief was not only irrelevant, but prejudicial. It is said by counsel for the state that, if the court erred in admitting this portion of the mother's testimony, the error was cured by the testimony of Mrs. Jones that she did not make such declaration. But the incompetent evidence introduced an irrelevant inquiry, and in prosecuting that inquiry the jury may have believed either witness.

The state having offered evidence tending to show that the child was under fourteen years of age at the date of the alleged offense, the defendant offered evidence tending to show that she was then more than fourteen years of age. Thereupon, her father being upon the stand, and having a memorandum of the dates of the births of his children, the memorandum having been made by himself from memory a few months before the trial, was permitted to testify that it appeared from the memorandum that Mary was born January 3, 1881. This paper had no quality which entitled it to consideration as substantive evidence. The witness had been permitted to testify fully as to his recollection

of the date of her birth, and his recollection at another time was not corroborative.

For errors in the admission of evidence, the judgments of the circuit court and court of common pleas are reversed.

Supreme Court of Tennessee.

Filed October 16, 1895.

ROGERS v. STATE.

1. HOMICIDE—DEFENSE.

The real or apparent necessity to take life, which is brought about by the design, fault or contrivance of the defendant, is no excuse.

2. SAME.

Even though sufficient cause does exist for reasonable apprehension, but the killing is not done under the fear it is calculated to inspire, or the fear is simulated, this defense will not be available.

3. SAME—PROOF.

The defendant, in this case, was held to have fired the fatal shot without sufficient or reasonable ground to apprehend danger to himself.

Appeal from a judgment convicting plaintiff in error of murder in the second degree.

James G. Rose, Shields & Mountcastle, and J. B. Holloway, for plaintiff in error.

G. McHenderson, Nat. B. Jones, J. F. Tafferty, W. S. Dickson, and G. W. Pickle, State's Atty., for the state.

McALISTER, J.—The plaintiff in error was indicted in the circuit court of Hamblen county for the killing of one John Scott, and at the December term, 1894, of said court he was found guilty of murder in the second degree, and his punishment fixed at confinement in the state prison for a term of ten years. This

is the second conviction of the defendant. On a former trial he was found guilty of murder in the second degree, and sentenced to the penitentiary for a term of twenty years. On appeal to this court, at the last term, the judgment was reversed.

It appears from the record that, at the time of the killing, the prisoner and the deceased lived on adjoining farms. The Scott family consisted of the deceased, his wife, and mother. The killing occurred on the defendant's premises, in the presence of both families, and originated in a quarrel about a cow. On the 11th August, 1893, the defendant, finding this cow in his corn-field, turned her out, and drove her to the Scott residence, for the purpose, as he claims, of getting them to keep her up. Defendant was on horseback at the time, and, stopping on the road in front of the Scott residence, he called several time. Failing to get any response, the defendant drove the cow onto his own premises, and put her up in his barn. It appears that, when Rogers passed the Scott residence with the cow, the deceased and his wife were in an upper front room. The wife of deceased heard the defendant, and saw him in the road with the cow, and called her husband's attention to the fact. The deceased immediately started out after the cow, and, when he had proceeded as far as the barn, his wife and mother went after him, and persuaded him to come back to the house. The two women, however, followed the defendant, who was driving the cow in the direction of his own premises. When the women reached the defendant's premises, he had put the cow up in his barn, and had gone on to the house. The women stopped in the public road, in front of defendant's house, between the house and barn. It appears from the evidence of the women that, he invited them to come into the house, remarking that he wanted to see John's new wife, but they declined the invitation, saying they were not dressed for calling. The defendant then sent his wife and daughter out, who renewed the invitation, but it was again declined. It appears, however, that the meeting between these ladies were entirely cordial; the record disclosing that the wife of defendant and the elder Mrs. Scott kissed each other. About

this time the deceased, who had left his home, and followed his wife and mother, also arrived. The defendant, Rogers, likewise invited the deceased into his house, but the deceased stated that he did not have time. The defendant then came down to the road where the Scotts were standing. Up to this time there had been no unfriendly words or hostile demonstrations on either side. The defendant seemed friendly towards the Scotts; at least, his manner and treatment of them had been courteous. About this time the elder Mrs. Scott remarked to the defendant: "We want to get our cow." The defendant replied: "You can have the cow, but you must keep her out of my corn." He then crossed the road to the barnyard gate, ostensibly for the purpose of turning the cow out. The elder Mrs. Scott remarked: "I don't think our cow has eaten any more of your corn this year than your mules eat of our corn last year." Defendant replied: "I don't want to talk foolishness. If you want a fuss you can have it." The defendant then suddenly turned back, crossed the road to his house, procured a shotgun, and came back as far as the platform bridge across a little ditch, where he stopped. The deceased still remained standing with his left hand on the fence, and his right hand in his pants' pocket. With the parties in this position, the defendant said to the deceased: "Take your hand out of your pocket." This command was repeated three times. The deceased, according to the testimony of the state's witnesses, made no response, and remained perfectly motionless. The wife of deceased testifies that, the first time defendant told deceased to take his hand out of his pocket, the command was spoken in a mild tone of voice, but the second and third times the command was spoken in louder tones; that, at the third command, defendant raised his gun to his shoulder, and fired. The deceased staggered off several steps, fell on his knees, and expired.

The testimony of the state is that deceased, prior to the shooting, made no demonstration of any kind, but stood with his hand in his pocket, and said nothing. After he was shot, he made two or three efforts to draw his pistol, but did not succeed. His wife went to him, and removed his pistol from his right pants' pocket,

and handed it to her mother-in-law, who carried it off. The defendant testified in his own behalf, and, in respect of the immediate facts of the killing, stated, viz.: That, after the Scott family arrived, the elder Mrs. Scott said they had come to get their cow. "I told them they could have their cow, but they must keep her out of my corn, and then crossed on to the barnyard gate to turn out the cow. The elder Mrs. Scott remarked that she did not think her cow had eaten any more of my corn this year than my mules had eaten of her's last year. I then remarked that I did not want any foolishness, that they must keep their cow out of my corn. By this time I had taken hold of the barnyard gate latch. The elder Mrs. Scott said she did not mean any foolishness either; that she was in the road, and would say what she pleased. At this time," the defendant continues, "John Scott was standing a short distance south of the barnyard gate, perhaps fifteen to twenty-five feet from where I stood, eying me with a very hostile look, with his right hand in his right pants' pocket; and I heard something click in his pocket, which I believed to be the cocking of a pistol; and, believing and fearing that he intended to shoot me, I turned around, and walked across the road into my yard, and into the house, and got a double-barrel shotgun, and walked back outside of my yard gate, and said to Scott: 'If you want to talk to me take your hand out of your pocket.' He said nothing but still kept his hand in his pocket. I repeated the request to him. He still said nothing, but stood looking at me in the same manner. I repeated the request the third time, when the deceased hurriedly turned himself about half around, and commenced drawing from his right-hand pocket a pistol, and had gotten it partly out of his pocket, so that I could see that it was a pistol. I threw my gun up, and fired at him."

It is perfectly obvious upon the defendant's own statement that the theory of self-defense is out of the question. It is well settled that the real or apparent necessity to take life which is brought about by the design, fault, or contrivance of the defendant is no excuse. Again, even if sufficient cause does exist for reasonable apprehension, but the killing is not done under the

fear it is calculated to inspire, or the fear is simulated, this defense will not be available. If the defendant had been in any danger, real or apparent, during the colloquy that occurred when he first started to turn out the cow, he shows that he left the scene of the danger, and, going to a place of safety, armed himself with a double-barrel shotgun, and deliberately returned to the scene of the difficulty. With a loaded gun in his hand, in an angry and overbearing manner, he commands the deceased to withdraw his hand from his pocket. Conceding the deceased did attempt at that moment to draw his pistol, as claimed by the defendant, the act of the defendant in killing him would not be justifiable homicide, but would constitute murder.

Again, the defendant was at fault in unnecessarily bringing about the hostile meeting by driving off his neighbor's cow, and confining it upon his own premises. The proof also shows that he used the first offensive language towards the mother of the deceased; and, before any hostile demonstration had been made towards him, he returned to his house, and armed himself with a shotgun. His conduct in ordering the deceased to withdraw his hand from his pocket was wholly unjustifiable, and, in our opinion, he fired the fatal shot without sufficient or reasonable ground to apprehend danger to himself. The verdict of the jury is well supported by the facts of the case.

Affirmed.

Supreme Court of Appeals of Virginia.

Filed September 19, 1895.

DUFF v. COMMONWEALTH.

1. INDICTMENT—LARCENY.

An indictment, under section 3712 of the Code, must describe the offense created by the statute, either in the terms of the statute itself or in language substantially equivalent thereto.

2. SAME.

The gravamen of the offense under this section is that the property levied upon is fraudulently removed, destroyed, received or secreted with intent to defeat the levy or distress.

3. SAME.

It is not enough to charge that the act was done unlawfully or injuriously, but it is necessary either to frame the indictment so as to charge a larceny of the goods, or to follow substantially the language of the statute and charge the act as having been fraudulently done.

Appeal from a judgment convicting plaintiff in error of removing chattels levied upon, in order to defeat the levy.

B. B. Campbell and B. N. Bell, for plaintiff in error.

R. Taylor Scott, Atty. Gen., for the commonwealth.

KEITH, P.—W. P. Duff was indicted in the corporation court of the city of Buena Vista in October, 1893, under section 3712 of the Code of Virginia, which provides that: "If any person fraudulently remove, destroy, receive, or secrete any goods and chattels that have been distrained or levied on, with intent to defeat such distress or levy, he shall be deemed guilty of larceny thereof." He might have been indicted for larceny, and proof of the facts set out in the section just quoted would have been sufficient to sustain a conviction for that offense. This court has held that under the statutes declaring that persons guilty of receiving money under false pretenses, embezzlement, receiving stolen goods, proof of the facts constituting these several offense is sufficient to sustain an indictment for larceny. See Pitsnogle's Case, 22 S. E. 351, and authorities there cited, decided at the Wytheville term of this court for 1895. The pleader, however, in this case preferred to frame his indictment upon the language of the statute, which it was entirely proper for him to do; but in that case it was necessary to describe the offense created by the statute, either in the terms of the statute itself or in language substantially equivalent thereto. The indictment in this case charges that a judgment was obtained against W. P. Duff

in the name of Joseph Slough for the sum of ten dollars and fifty cents and one dollar and thirty cents for costs; that upon the judgment an execution issued, which was placed in the hand of Silas Nuckols, a constable in and for the city of Buena Vista, who, on the 17th day of December, 1892, levied the said execution upon a horse, a mare, and other property of the goods and chattels of W. P. Duff, and that afterwards, to wit, on the day and year aforesaid, Duff, "with intent to defeat the levy aforesaid, the said mare, horse, and harness, so as aforesaid taken by the said Silas Nuckols, by virtue of the execution before mentioned, and in custody of the said Silas Nuckols, constable, as aforesaid, then being, from and out of custody, and against the will of him, the said Silas Nuckols, then and there unlawfully and injuriously did remove, take, and carry away, the said execution for the sum before mentioned being due, nor any part thereof being paid, and other wrongs to the said Silas Nuckols then and there did, to the great damage of the said Silas Nuckols, and against the peace and dignity of the commonwealth of Virginia." The gravamen of the offense created by the section under which the defendant was indicted is that the property was fraudulently removed, destroyed, received, or secreted with intent to defeat the levy or distress. It was not enough to charge that the act was done unlawfully and injuriously, but it was necessary, as we think, either to frame the indictment so as to charge a larceny of the goods, or to follow substantially the language of the statute, and charge the act as having been fraudulently done. To this indictment there was a demurrer, which was overruled, the case tried, the defendant found guilty, and a fine imposed. We think that the court erred in overruling the demurrer to the indictment, and for this reason the judgment complained of should be reversed, and the case should be remanded to the corporation court of the city of Buena Vista.

Court of Criminal Appeals of Texas.

Filed December 25, 1895.

HENDERSON v. STATE.

1. APPEAL—CRIMINAL LAW—STATEMENT.

Where the statement of facts in a criminal case is not filed within ten days after the adjournment of the court, and no sufficient showing is made why it was not filed within the time allowed by law, the court cannot consider such statement.

2. SAME.

In the absence of a statement of facts, it is impossible for the appellate court to tell what will be the effect of newly discovered evidence on another trial.

Appeal from a judgment convicting defendant of burglary.

Mann Trice, for the state.

HENDERSON, J.—The appellant was tried under an indictment charging him with burglary in the nighttime, was convicted, and given two years in the penitentiary. From the judgment and sentence of the lower court, he prosecutes this appeal.

This is a companion case with that of Anderson v. State (decided at this term), 33 S. W. 371. The statement of facts in this case was not filed within ten days after the adjournment of court, and no sufficient showing is made why it was not filed within the time allowed by law. There was no diligence, and we cannot consider the statement of facts.

There is a motion filed for a new trial on the ground of newly-discovered evidence; and affidavits of certain witnesses are attached thereto, showing what they would testify to on another trial of the case. In the absence of a statement of facts, it is impossible for us to tell what effect the newly-discovered evidence would have on another trial of the case; and, moreover, the testimony of none of the witnesses appears to us to be of a material character. When we look to the affidavits of the witness Parker, on whom appellant mainly relies to impeach what he

states the sheriff testified to as to the identity of the parties, it does not seem to bear out the contention of appellant. His evidence, as disclosed in his affidavit, does not show that the sheriff, Erickson, could not have seen what he testified to, as to the identity of said parties. The most that can be said of his testimony is that he himself was not in such a position as to have seen them at the time of the alleged burglary, but it does show that the sheriff was in a better position, in that regard, than he was.

The indictment and the charge of the court are in proper form, and, there being no errors in the record, the judgment of the lower court is affirmed.

Court of Criminal Appeals of Texas.

Filed December 20, 1895.

TAYLOR v. STATE.

APPEAL—STATEMENT.

Where no excuse is shown for a failure to file a statement of facts within the time prescribed by law, such statement will not be considered.

Appeal from a judgment convicting defendant of assault with intent to murder.

Mann Trice, for the state.

HURT, J.—Appellant, having been tried under an indictment charging him with assault with intent to murder, was convicted, and his punishment assessed at two years' confinement in the penitentiary. From said judgment and sentence, he prosecutes this appeal.

The court in which this case was tried adjourned on November 2, 1895. An order was granted allowing ten days in which to prepare and file a statement of facts. A statement of facts was

filed on November 26th, following. No excuse was shown for a failure to file same within the time prescribed by law. The statement of facts, therefore, cannot be considered. See *State v. Cook* (decided at this term), 33 S. W. 359, and authorities cited. We have carefully examined the record in this case, and find no error.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

Filed December 11, 1895.

GRAHAM v. STATE.

1. ~~HOMICIDE~~—INSTRUCTION—PROVOCATION.

Where defendant and deceased had been previously on good terms, and the time from the beginning of the difficulty until the fatal shot was very short, an instruction that the provocation must arise at the time of the commission of the offense was held not to be improper, in view of the further instruction to consider in connection therewith all the facts and circumstances in evidence in the case.

2. SAME—SELF DEFENSE.

Refusal to give especial charge on manslaughter or self-defense is proper, where there are no facts in the case authorizing it or involving the question of self-defense.

Appeal from a judgment convicting defendant of murder in the second degree.

Rice & Bartlett, for appellant.

Mann Trice, for the State.

HENDERSON, J.—Appellant was convicted of murder in the second degree, and given fifteen years in the penitentiary. From the judgment and sentence of the lower court, he prosecutes this appeal.

We will quote so much of the testimony as is necessary for the purpose of presenting the assignments of error in this case. The first witness testified as follows: "I know the defendant, and was

acquainted with the deceased. I was present at the time of the shooting of William Hayes by the defendant. Those present were Albert Moore, Nick Bennett, Thornton Robertson, and Bob. Sexton; and we had just started out to the end of a row, all of us being engaged in hoeing corn together in the same field. William Hayes, the deceased, was lying down, and the defendant came up to him, and asked for a stump of a cigarette, and when the deceased gave it to him he (defendant) remarked, 'You had better give it to me,' and deceased asked, 'Why?' Defendant replied, 'Because I would have mashed your nuts out with this hoe.' Deceased replied, 'You wouldn't do a damn thing you say you would.' Defendant then stated, 'No, I wouldn't, because you have got the claps.' Deceased then said, 'The man that says I have got the claps is a damned liar, and would f—k his mother on a cooling board.' A scuffle then ensued over the hoe, and the deceased took it away from the defendant. At this the defendant pulled out his pistol, and told the deceased he had better not say that again, when the deceased repeated it two or three times, the defendant at each time telling him not to repeat it. After the defendant got his gun, the deceased started to the house for his gun. The defendant got in front of him, and tried to prevent him from going to the house. That the defendant stopped him two or three times, and told him not to go to the house; that he would give up his pistol to anybody if he thought he would shoot him, and fight him an even fight. That at this time they were close together, and Levy Stewart walked up to the defendant, to get his gun, when the defendant remarked that he would give his gun to no damned man. That when Levy Stewart walked up the deceased had his hands up, and was hitting the defendant on the left arm, and defendant had his pistol down by his side, and with the other hand was trying to keep William Hayes, the deceased, from hitting him. That they were right close together, and were touching each other on the arms. That just as Levy Stewart walked up to them the defendant stepped back and fired the fatal shot. That they seemed to be on good terms before this trouble, and the defendant didn't seem to get mad until the

deceased spoke about his mother as above stated. About a quarter of an hour before the trouble, I heard the defendant say that he was going to kill some son of a bitch before the sun went down. That he did not say who, nor did he seem to be mad. That he had just had a little squabble with Thornton Robertson that morning, and I don't know to what or whom he referred when he spoke." The testimony of the other eye witnesses was not materially different from this.

The appellant complains that the court in its charge unduly restricted the provocation to the very time of the shooting. From the record in the case, we do not understand that there was any trouble between these parties anterior to the one in which the deceased lost his life. Hitherto they appear to have been on good terms, and from the time of the beginning of the difficulty until the fatal shot appears to have been but a very short time, so that reasonably the court's charge with reference to immediate provocation had reference to the provocation which then brought on the difficulty. It is true, the court instructed the jury that the provocation must arise at the time of the commission of the offense, yet the jury were further instructed to consider in connection therewith all the facts and circumstances in evidence in the case ——— v. ———. While the charge of the court in this regard was a proper charge on manslaughter ensuing on the provocation involving insulting words or conduct towards a female relative of deceased, yet in this case it does not occur to us that the language used bears that import, or that it was so intended by the deceased. The appellant, it appears, offered the first insult. The deceased, in response, told him he was base enough to prostitute his mother. This, in terms, did not imply that this mother was a base woman, but was an insult aimed directly at appellant, and in response to an insult offered deceased by him.

There was no occasion to give the special charge No. 1, on manslaughter, asked by appellant, as there were no facts in the case authorizing it. There was no self-defense in this case. The appellant was the original aggressor, and, after first insulting the deceased, drew his hoe on him. This was taken away from him

by the deceased. It does not appear that deceased attempted to strike appellant with the hoe. Appellant then drew his pistol on the deceased, and deceased proposed to go several hundred yards to his home and get his pistol, and fight him with pistols. Appellant then proposed to surrender his arms and fight a fair fight, but, when this was acceded to by deceased, appellant refused to give up his pistol, and, with it still drawn on appellant, attempted to prevent him from going to his home, and, on the deceased insisting, shot him down. If there is any question of self-defense involved in this statement of the case, we fail to see it. The difficulty appears to have been sought and brought on by appellant, and persistently followed up until he fired the fatal shot. There was no occasion for the court to give a charge on self-defense at all.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

Filed December 20, 1895.

HANNAMAN v. STATE.

1. EXCISE—SALES TO MINOR.

Where the state proves the sale to the party to whom the beer is sold is a minor, the burden is upon the defendant to introduce the written consent or permission of the parent or guardian.

2. SAME—INSTRUCTION.

Where the minor did not name the party who sent him when he purchased the beer, an instruction that, if somebody sent him, it is not a sale to the minor, is unnecessary.

3. CRIMINAL LAW—JUROR—OBJECTION.

The defendant must, at the time the jury is impaneled, object to a juror, if disqualified, and reserve his bill of exceptions to the action of the court.

Appeal from a judgment convicting defendant of selling beer to a minor.

Doremus & Henderson, for appellant.

Mann Trice, for the state.

HURT, P. J.—This is a conviction for selling beer to a minor. It was not necessary for the state to introduce the mother of the minor, to prove by her that she had not given her consent. When the state proves the sale, and the party to whom the beer was sold was a minor, the burden is upon the appellant to introduce in evidence the written consent or permission of the parent or guardian. The court's charge was correct in every particular. The facts of this case did not require a charge to the effect that, if somebody else had sent the minor to purchase the beer, it would not be a sale to the minor. Why? Because, in the transaction upon which this conviction was had, the minor expressly states that he did not name the parties who had sent him when he purchased the beer. This being the case, there is no conflict in the authorities that it was a sale to the minor.

Complaint is made because one of the jurors who sat in the case was obnoxious to challenge for cause. There was no objection made to this juror when he was impaneled. In addition to this, under the circumstances of this case, as presented by the record, the fact that this juror was a witness in the case of *State v. Eaton* would not disqualify him as a juror in this case. The record does not show that the testimony in both cases was the same, but, be this as it may, we hold that at the time the jury is impaneled the appellant must object, and reserve his bill of exceptions to the action of the court. This was not done.

An effort was made to impeach the main witness, Wilson, who was a colored boy. The court properly instructed the jury in regard to this matter, and the jury passed upon his credibility, and by their verdict say they believe him. If what he states is true, the verdict is sustained by the testimony.

The judgment is affirmed.

Court of Criminal Appeals of Texas.

Filed December 20, 1895.

MORRIS v. STATE.

1. HOMICIDE—NEGLIGENCE—EVIDENCE.

On a trial for negligent homicide in rapidly driving the wagon in which defendant was riding, defendant's declarations made a short time after, and at the place of, the injury, as to decedent's acts and his own opinion thereof, was part of the *res gestae*, and admissible to characterize the defendant's driving on that occasion as negligent.

2. SAME—INSTRUCTION.

A charge upon the question of negligence that "the degree of care and caution required to avoid danger is such as a man of ordinary prudence would have used under like circumstances," is sufficient.

3. SAME.—NOTICE.

Where the facts show that the deceased was riding in defendant's wagon, and that defendant drove his team in a furious and rapid manner, the latter is charged with notice that his acts endangered the life of the deceased.

4. SAME—VOLITION.

Whether the deceased was thrown and hurled from the wagon without any volition on his part, but simply on account of the speed of the driving, or whether, in an attempt to get out of the said vehicle, he was violently thrown therefrom, the defendant is, in either event, liable for his negligence in driving at such a furious rate of speed.

5. TRIAL—REMARKS OF COUNSEL.

Where the defendant apprehends any injury from the remarks of the county attorney in his closing argument, it is his duty to ask that the court eliminate the same from the consideration of the jury, before he can be heard to complain.

'Appeal from a judgment convicting defendant of negligent homicide.

A. J. Nichols, for appellant.

Mann Trice, for the state.

HENDERSON, J.—The appellant was tried in the court below on an indictment charging him with negligent homicide

in the first degree, was convicted, and his punishment assessed at a fine of seventy-five dollars; and from the judgment of the lower court he prosecutes this appeal.

There is nothing in appellant's motion in arrest of judgment. We think the statutes on the subject sufficiently define "negligent homicide."

Appellant complains of the action of the court in allowing several state's witnesses to testify as to declarations of appellant, made where the body of deceased was found in the road. It appears that, after the deceased fell or was thrown from the wagon, the appellant drove his wagon a short distance further, and then returned to the place where the deceased was found lying in the road in an unconscious condition, and he there remarked "that the God damn fool jumped out of the wagon, and broke his damn-fool neck. If I had a boy that had no more sense than the deceased, I would take him out and kill the damn fool." Appellant was drunk, and commenced to sing, "Old time religion." He said a great many foolish things that the witnesses could not remember. These expressions were used at the place where the homicide occurred, very shortly afterwards, — could not have been exceeding a few minutes; were a part of the *res gestae*, and so admissible in evidence. Nor do we think the court erred in refusing to give the special charge asked by appellant on this subject. Said evidence, as adduced, was a part of the case, and was looked to, under the charge of the court, not as indicating any malice on the part of appellant, because this was not a charge of malicious killing, but was looked to simply by them as a circumstance to characterize the act of appellant in driving the team on that occasion as negligent.

There was no error on the part of the court in failing to further define "negligence" than as given in the main charge. The charge of the court is in the following language: "The degree of care and caution required to avoid danger is such as a man of ordinary prudence would have used under like circumstances. This was in accordance with the language of the statute on the

subject, and is in consonance with the ordinary definition of negligence.

Nor do we think the court erred in refusing to give the charge asked by appellant, as presented in his bill of exceptions No. 2. We do not believe the facts of this case required the court to give the special charge asked, hinging appellant's guilt on the consciousness on his part that his acts were then endangering the life of deceased. The facts show that the deceased was riding in his wagon, and that he drove his team in a furious and rapid manner. In such condition, he was charged with notice that his acts did endanger the life of the deceased.

Appellant also complains that the court should have given his special charges Nos. 3 and 4, asked, which presented the issue that deceased jumped from the wagon, instead of being thrown out, as charged in the indictment. The charge contained in the indictment, and which constituted the gravamen of the offense, was that appellant was negligent in driving the wagon in which deceased was riding in such a rapid manner along the road as to endanger the life of deceased, who was riding in his wagon at the time, and that deceased was thrown therefrom. No one appears to have seen exactly how the deceased got out of the wagon. After he was out, some one—either the parties in the same wagon, or in another wagon that was racing with appellant's—noticed it, and, on attention being called to the fact, they went back a short distance, and found the deceased lying in the road, dangerously hurt, and in an unconscious condition. The gist of the charge against appellant was rapid and negligent driving. The charge in the indictment is that he was thrown from the wagon. Evidently he was hurled to the ground with a great deal of force, and whether his being so thrown and hurled from the wagon was without any volition on his part, but simply on account of the speed of the driving, or whether, in an attempt to get out of said vehicle, he was violently thrown therefrom, it occurs to us, is immaterial. In either event the appellant was liable for his negligence in driving at such a furious rate of speed. Whart. Hom. §§ 109, 366, 374. We would further observe that it is

a familiar principle of the law of homicide that, as to the allegation of the instrument by which death is inflicted, there is no variance where the proof shows that another instrument than that alleged was one causing the same character of wound or injury; so that it would appear to be immaterial whether he was thrown from the wagon wholly without any volition on his part, or thrown from it while exercising a volition to get out of the vehicle to save himself on account of the rapid and dangerous speed at which it was being driven.

As to the remarks of the county attorney in his closing argument, if the appellant apprehended any injury therefrom, it was his duty to ask that the court eliminate the same from the consideration of the jury, before he can be heard to complain.

The questions in this case, we think, were fairly submitted to the jury, and from the evidence they believed that the appellant was negligent, under the circumstances, in driving his team at a furious rate of speed while the deceased was riding in his wagon, and that such rate of speed created an apparent danger, causing the death of deceased, and that the same was negligence on his part. The verdict of the jury is, in our opinion, supported by the evidence in this case, and the judgment should be affirmed.

Supreme Court of Alabama.

Filed November 28, 1895.

ROBINSON v. DICKERSON.

1. CRIMINAL LAW—FORMER ACQUITTAL.

An order by a magistrate on a preliminary examination is not a bar to a second preliminary examination.

2. SAME—BAIL.

Where defendant, on a preliminary examination for murder before a justice of the peace, is admitted to bail but fails to give

bail, and subsequently on a preliminary trial before a city judge, is committed to jail without bail, he is not entitled to be released, after indictment for murder, on giving the bail fixed by the justice of the peace.

Appeal from a judgment denying a writ of mandamus.

C. C. Whitson, for appellant.

Brown & Dwyer, for appellee.

COLEMAN, J.—Upon an affidavit made before a justice of the peace charging the petitioner with the offense of murder, the justice issued a warrant for his arrest, and, upon preliminary examination, fixed his bail at \$1,000. In default of making the bond, petitioner was committed to jail. Subsequent to the arrest upon the warrant issued by the justice of the peace, affidavit was made before the judge of the city court of Talladega, charging the petitioner with the same offense, and the judge issued a warrant of arrest for the petitioner. A second preliminary trial was had, which resulted in the commitment of the petitioner to jail without bail. At the following term of the circuit court the grand jury indicted the defendant and two others, jointly, for murder in the first degree. The term of the court expired, and court adjourned, without any order having been entered in the cause further than the granting of a severance to petitioner. Several months afterwards, petitioner executed a bond in the sum of \$1,000, with sufficient security, as prescribed by the justice of the peace, and offered it to the sheriff, and demanded bail. The sheriff refused to admit the petitioner to bail. He then applied to the circuit court judge for a writ of mandamus to compel the sheriff to accept the bond, and admit him to bail. The circuit court judge denied the writ, and petitioner appealed to this court. There was no question made as to the sufficiency of the securities to the bond offered as bail.

The first question is whether the judge of the city court had jurisdiction to hold a second preliminary trial. Except for the

constitutional right and statute law, which declare that a person shall not be put in jeopardy twice for the same offense, there does not seem to be any legal prohibition of more than one prosecution, unless the question falls within the principle that final judgments of courts of competent jurisdiction are conclusive upon all other courts of no higher jurisdiction. Conceding, then, that the justice of the peace and the judge of the city court, as magistrates, had equal and concurrent jurisdiction, the questions are whether a party is in "jeopardy," within the meaning of that term, when he is put upon a preliminary trial before a magistrate, who has no jurisdiction to try him for the offense. Clearly not. It is not necessary to city authority or present an argument on this proposition. No order of the committing court, whether it discharges or commits the defendant, will support a plea to acquit or convict. Will such an order bar a second preliminary examination? There is no statute which has declared such to be its effect. It is contended that, unless this is the rule, a party may be subjected to as many arrests as there are magistrates in the county. This is the argument of "*ab in convenienti*." But it is admitted, and that is the law in this state (Crawlin's Case, 92 Ala. 101; 9 South. 334; Nicholson's Case, 72 Ala. 176), that, if the defendant be discharged upon preliminary investigation by the magistrate, he may be arrested on a second warrant. If this be true, under this rule he is subject to as many arrests as there are magistrates in the county, at least until one is found who is willing to commit or require bail. But, if the order of the magistrate is final and conclusive on other magistrates, it is because of the jurisdiction to make a final order, and not because of the particular conclusion reached by the justice of the peace. The order would be equally final and binding, whether the defendants be discharged or committed. There is no answer to this proposition. It would also conclude a warrant issued upon the finding of a coroner's inquest, for this merely secures a preliminary investigation. Cr. Code, § 4809. There being no statute on the subject, what is the rule at common law? In the case of *Clark v. Cleveland*, 6 Hill, 349, in a well-con-

considered opinion by Cowen, J., it was held that a second arrest under the same warrant was not illegal. In a subsequent case (*Doyle v. Russell*, 30 Barb. 300) the opinion in 6 Hill, 349, supra, was criticised so far as that case upheld the validity of the second arrest on the same warrant; the court being of the opinion that the first warrant had expended itself by the first arrest and bail. There did not seem to be any question as to the right to arrest on a second warrant. In 2 Hawk. P. C. c. 13, section nine seems to support the view expressed in 30 Barb. 300, supra, as to the invalidity of a second arrest on the same warrant. We cannot find anywhere in the common law, nor in decisions in the absence of statute, the doctrine that an order by a magistrate on preliminary examination is a bar to a second preliminary examination. The old books abound with cases for malicious prosecution, growing out of unnecessary or repeated arrest. The law affords redress to the arrested party in all such cases. There are cases where parties were held to bail with surety in civil actions. In such cases, when the bail bond was directed to stand as security for the debt, it was held that a second arrest would not lie, without surrendering the security. The reason was that, the debtor having obtained security for his debt by the writ and bail, he could not, in justice and good faith, hold the security, and by the writ imprison the debtor, or force him to furnish additional security. The creditor was required to show some sufficient ground for the second arrest. *Wilson v. Hamer*, 1 Dowl. 248.

We have discussed the question the theory that the defendant was arrested the second time in a legal sense, but we are of opinion such is not the case. A rearrest implies that the party had been released, either on bail or by discharge or by the voluntary act of the person having him in legal custody. In the case before us the petitioner was in jail, in default of giving the bond, both when he was brought before the city judge for preliminary investigation, and when the indictment was returned into court. There were no securities whose rights could be interfered with by the action of the committing court. When on bail, the person

charged is in the custody of his sureties. They have the right to surrender their principal at any time, and have him committed to jail. We cannot perceive any good reason for holding that the sureties may relieve themselves from the responsibility of his custody by putting him in jail, and at the same time hold that the state which has him in custody may not retain him by virtue of a second commitment, or an indictment preferred against him. Section 4787 of the Criminal Code provides that, when a party has been discharged on habeas corpus, he cannot be arrested again for the same offense, unless he has been indicted, or unless he was discharged for defect of proof, and was again arrested on sufficient proof,—a provision wholly unnecessary if the order discharging the defendant afforded protection against rearrest without the statutory provision. By implication, the statute admits he may be rearrested after indictment. There is a very satisfactory reason for this rule in habeas corpus cases. The jurisdiction to hear and fix bail in habeas corpus cases is conferred by statute on certain officials, who are presumed to be more learned in the law, and further removed from and less liable to be moved by improper influences, than many of the officers having jurisdiction for commitments.

The case of *Ingram v. State*, 27 Ala. 19, when tested by the facts stated in the opinion, is not authority to the contrary. The opinion rests solely upon the ground that a justice of the peace has no authority to issue a warrant of arrest upon the ground that the bail taken by the defendant was insufficient or had become insufficient. The authority of a justice of the peace is prescribed by law, and he has no other in matter of arrest. There is no provision which gave him jurisdiction to issue a warrant upon the facts and for the purposes stated, and his action was null and void.

Neither is the case of *Skelton v. Robinson* (Ala.), 16 South. 74, an authority. In the case at bar the city judge, by a subsequent order upon preliminary examination, committed petitioner, who had not given bail, to jail without bail. If we are right in our conclusion that the city judge had jurisdiction, this

commitment was valid, and justified the retention of petitioner until admitted to bail by order of the judge of the circuit court, indorsed upon the indictment, or by habeas corpus. The purpose of a preliminary examination in all cases is to secure the presence of the prisoner, to answer such charges as may be brought against him; and by statute it is declared that "the essence of all undertaking of bail is the appearance of defendant at court." The bond is forfeited if the defendant does not appear, although the grand jury may not prefer an indictment. After indictment a bench warrant may be issued by the court, or capias by the clerk, unless otherwise provided by the statute, as is the case in some of the states. If the party is on bail, and he is arrested by virtue of a bench warrant or capias legally issued, the sureties are discharged. If the condition of the bond required the appearance of the principal at a designated term, and the principal appeared, the condition was performed, and there could be no forfeiture. If the condition required the principal to attend from term to term until discharged by law, his mere attendance at the first term does not fulfill the condition. The condition required his attendance from term to term, until discharged by law, or unless there was a discontinuance of the charge. These provisions and rules as to bail do not, and were not intended to, interfere with the rules of law and proceedings after indictment. It requires statutory provision to prevent the issue of a bench warrant or a capias on indictment. The case of *Smith v. Kitchens*, 51 Ga. 158, is a direct authority on the question; so is the case of *Ex parte Cook*, 35 Cal. 107. We know of no case at common law nor decision of a state court, unless predicated on statute, where the right and duty to arrest after indictment found was ever questioned. Section 4395 of the Criminal Code provides that, after indictment has been returned, the court may order any defendant who is present, and who has not been arrested, to be taken into custody without process. Section 4396 of the Criminal Code provides that "a writ of arrest must be issued by the clerk forthwith after the finding of the indictment, against each defendant, who is not in actual custody or who has not been

bailed," etc. Section 4411 provides that "circuit and city judges may, during the term time, by order entered on the minutes, fix the amount of bail required in all cases of bailable felonies, pending in the court," etc. Certainly, if the judge omits to comply with this provision, no advantage accrues from such omission to any person in actual custody; nor does this section authorize him to fix the amount of bail for a defendant indicted for murder in the first degree. Under the facts, the clerk was not required, even if he had the authority, to issue a *capias* under section 4396, *supra*, for the defendant was in actual custody,—in jail,—and had not been bailed. Nor was it a case which called for the interposition of the court under section 4395, *supra*, for the defendant was not present, and had been arrested, and was already in custody. The failure of the court to enter an order under this section, in a case where it might be entered, could avail the defendant nothing. *Prima facie*, under an indictment for murder, the offense is not bailable, and this presumption is not overcome by any order on a preliminary trial. Where a party under indictment for murder in the first degree sues out a writ of *habeas corpus*, upon production of the indictment the defendant must overcome the presumption of the law by legitimate evidence and the order of the magistrate prescribing bail is not legal evidence in the case. *Ex parte Rhear*, 77 Ala. 92; *Abernathy v. State*, 78 Ala. 411. Under no aspect of the law, whether considered with reference to the commitment by the city judge, or the rights of petitioner after indictment found for murder in the first degree, is he entitled to the writ of *mandamus*. *Skelton v. Robinson* must be overruled.

Mandamus denied.

HEAD, J., dissents from the opinion so far as it overrules the case of *Skelton v. Robinson*.

Court of Criminal Appeals of Texas.

Filed December 20, 1895.

BRAZOS v. STATE.

1. WITNESS—CREDIBILITY.

Where defendant, as a witness in his own behalf, testified that he did not know that he was under indictment for other offenses, the indictment therefor was admissible in order to enable the jury to pass upon the defendant's credibility as a witness.

2. APPEAL—EXCEPTIONS.

Where a bill of exceptions fails to show the object or purpose of testimony, and its relevancy is not apparent to the appellate court, the objection thereto will be held to have been properly sustained.

Appeal from a judgment convicting defendant of theft.

Mann Trice, for the State.

HENDERSON, J.—Appellant was convicted in the district court of Harris county of the theft of property over the value of fifty dollars, and his punishment assessed at two years' confinement in the penitentiary, and he prosecutes this appeal.

Appellant complains that the court permitted the district attorney to offer in evidence indictments pending in the district court of Harris county for criminal offenses committed by him. Appellant was introduced as a witness in his own behalf, and was asked whether he was under indictment for said offenses or not. Appellant admitted that he had been served with some papers while he was in jail, but, if he was indicted for these offenses, he did not know it. Appellant is shown to have objected to the questions being propounded, on the ground that the indictments were better evidence. The indictments were subsequently introduced in evidence, and were properly limited by the court in the charge to the jury, the court stating that said indictments could only be considered in order to enable them to pass upon the credibility of the witness. In this there was no error.

The appellant complains that the court sustained the objection of the district attorney to the question asked Ella Brazos, the wife of appellant, to the effect that, when the appellant came

up from Galveston, he left some ducks at the house of one Caldwell, and that she called at said house and took the ducks away. To this it is sufficient to say that the bill fails to show the object or purpose of the testimony, and, moreover, it does not occur to us how said testimony was relevant in this case. *May v. State*, 25 Tex. App. 114.

Appellant also complains that the state was permitted to prove by the officer who arrested him that he at the time took from appellant a pistol, which was identified by one Winkler as a pistol that had been stolen from said Winkler. No reason is assigned in the bill of exceptions why this testimony was not admissible. In addition to this, it is shown by the explanation of the court to the bill of exceptions that this testimony was elicited by the appellant, and of course he cannot complain; and moreover the court, in its charge to the jury, eliminated all testimony in regard to the pistol.

These are all the bills of exception that require notice from us. There being no errors in the record, the judgment of the lower court is affirmed.

Supreme Court of Alabama.

Filed June 14, 1895.

JACKSON v. STATE.

1. ASSAULT—INSTRUCTIONS.

An instruction, which authorizes and requires the jury to acquit if they are unable to tell with absolute certainty that the criminal evidence presented the truth, or if they have any doubts of guilt, whether a reasonable doubt or not, is properly refused.

2. SAME.

Where an assault and battery or simple assault are, in addition to assault with intent to murder, charged in the indictment, an instruction that the jury must believe from the evidence beyond a reasonable doubt that the defendant intended to kill the person upon whom the assault was alleged to have been committed before they could find him guilty as charged in the indictment, is properly refused.

'Appeal from a judgment convicting defendant of assault with intent to kill.

McCLELLAN, J.—Several exceptions were reserved to the rulings of the trial court on the inadmissibility of testimony. They have each been considered by the court, and found to be so obviously without merit that a discussion of them is unnecessary. The other exceptions go to the refusal of the court below to give two charges requested by the defendant. The first of these is as follows: "The court charges the jury that, if two theories are disclosed by the evidence in this case, and according to the evidence supporting one theory he would be guilty, but according to the evidence supporting the other he would be innocent, and the jury cannot tell which testimony presents the truth, then they should give the prisoner the benefit of the doubt, and accept as true that evidence which is consistent with his innocence, and find him not guilty." One infirmity of his request, sufficient to justify its refusal, is that its manifest tendency, to say the least, was to authorize and require the jury to acquit if they were unable to tell with absolute certainty that the criminalizing evidence presented the truth, or if they had any doubt of guilt, whether a reasonable doubt or not. The other charge to the refusal of which an exception was reserved was to the effect, the offense charged being assault with intent to murder, that the jury must believe from the evidence beyond a reasonable doubt that the defendant intended to kill the person upon whom the assault was alleged to have been committed before they could find him guilty "as charged in the indictment." This instruction would have been proper, but the indictment charged only the offense of assault with intent to murder. Intent to kill is a necessary element in that offense, but it is not necessary to assault and battery or simple assault, which latter offenses are also charged in this indictment, and the effect of the charge, had it been given, would have probably been to mislead the jury to the conclusion that there could be no conviction under this indictment unless the defendant had the intent to kill. *Lundy v. State*, 91 Ala. 100; 9 South. 189; *Horn v. State*, 98 Ala. 23; 13 South. 329; *Smith v. State* (Ala), 15 South. 843.

Affirmed.

INDEX.

ADULTERY.

1. Evidence.

Such offense is but seldom, in its entirety, capable of direct positive proof, but it is generally to be inferred from facts and circumstances leading to it as a necessary conclusion. *Brown v. State* (Sup. Ct. of Alabama), 439.

2. Instruction.

An instruction that, if the defendant and the woman agreed to go to Mobile and live in that condition, there can be a conviction in the county of the agreement, is erroneous. *Id.*

3. A refusal to charge that "before the jury can convict the defendant they must be satisfied, to a moral certainty, not only that the proof is consistent with the defendant's guilt, but that it is wholly inconsistent with every other rational conclusion, and, unless the jury are so convinced by the evidence of defendant's guilt that they would each venture to act upon that decision in matters of the highest concern and important to his own interest then they must find the defendant not guilty," is error. *Id.*

4. Section 4012.

Section 4012 of the Criminal Code is directed against a state or condition of cohabitation which the parties intend to continue so long as they may choose, as distinguished from a single act or occasional acts of illicit sexual intercourse. *Id.*

5. Similar acts.

When it is material to show the intent with which the particular act or acts charged was done, evidence of another similar act or other similar acts, though in itself or of themselves constituting a criminal offense, may be given. *Id.*

6. On the trial of an indictment for adultery, it is admissible to show that, subsequent to the finding of the indictment, the parties were living in adultery, if the time intervening was not of such length as to repel all reasonable inference that there was between the two conditions continuity or connection. *Id.*

APPEAL.

1. Affirmance.

A judgment of conviction will be affirmed in the absence of a statement of facts with the record of the case, where the indictment is correct and the charge such a one as is proper to be given under a statement of facts provable in the case. *Favors v. State* (Ct. of Criminal App. of Texas), 167.

2. A regardful examination of the record as presented discloses no erroneous ruling of the court on the admission or rejection of evidence, for which judgment of conviction should be reversed. *State v. Isaacson* (Sup. Ct. of S. Dakota), 311.

3. Bail.

A recognizance which states that defendant was convicted of "unlawfully carrying a pistol," states no offense. *Black-shear v. State* (Court of Crim. App. of Texas), 144.

4. A recognizance to abide the judgment of a "court of appeals," is defective. *Id.*

5. Bastardy proceeding.

Neither section 6143 of General Statutes of 1894, nor any other statute regarding supersedeas on appeals in civil actions, applies to an appeal from a judgment in bastardy proceedings. *State v. Allrick* (Sup. Ct. of Minnesota), 344.

6. Criminal law—Statement.

Where the statement of facts in a criminal case is not filed within ten days after the adjournment of the court, and no sufficient showing is made why it was not filed within the time allowed by law, the court cannot consider such statement. *Henderson v. State* (Ct. of Criminal App. of Texas), 541.

7. In the absence of a statement of facts, it is impossible for the appellate court to tell what will be the effect of newly discovered evidence on another trial. *Id.*

8. Denial.

A motion for a new trial is properly denied where the notice does not particularly state any error whatever. *State v. Pilgrim* (Sup. Ct. of Montana), 4.

9. Evidence.

Where there is some evidence conducing to establish the guilt of the accused, a verdict of guilty be disturbed on appeal. *Cole v. Commonwealth* (Ct. of App. of Kentucky), 126.

10. Exceptions.

Where a bill of exceptions fails to show the object or purpose of testimony, and its relevancy is not apparent to the appellate court, the objection thereto will be held to have been properly sustained. *Brazos v. State* (Ct. of Crim. App. of Texas), 558.

11. Exceptions—Waiver.

Where an exception, though the refusal to charge is excepted to, is not set out by the appellant in stating his case on appeal, it is waived. *State v. Blankinship* (Sup. Ct. of N. C.), 377.

12. First instance.

It is too late on a motion for a new trial to urge objection to the judge's charge, when no instructions on the point were asked, and no exceptions made. *State v. Vickers* (Sup. Ct. of Louisiana), 184.

13. Harmless.

The exclusion of a proper question is no ground for reversal, where the same fact appears from the evidence admitted as the excluded testimony was intended to establish. *State v. Kowolski* (Sup. Ct. of Iowa).

14. The case will not be reversed for error in allowing an improper question to be answered, where such answer is unim-

portant and does no harm. *People v. O'Neill* (Sup. Ct. of Michigan), 337.

15. Instruction.

The court commits no error in refusing charges requested by a party which are mere repetitions of charges already given at his request. *State v. Murphy* (Sup. Ct. of Alabama), 252.

16. Mandamus.

Where no bond is filed or money deposited by appellant within the time prescribed at law or at all, the case remains precisely as it was before the appeal was attempted. *Bokien v. State* (Sup. Ct. of Washington), 375.

17. New trial.

Before the adoption of the Penal Code of 1895, an appeal from a judgment brings up for review the order denying the defendant's motion for a new trial. *State v. Pilgrim* (Sup. Ct. of Montana), 4.

18. Offer to prove.

Where a party states to the court certain facts which he proposes to prove by a witness, some of which are legal and others are inadmissible, the court does not commit a reversible error by sustaining an objection to the introduction of the facts as an entire statement. *Murphy v. State* (Sup. Ct. of Alabama), 251.

19. Pauper.

The fact that the appellant is a pauper does not, of itself, relieve him from the necessity of giving an appeal bond. *Bokien v. State* (Sup. Ct. of Washington), 375.

20. Reasonable doubt—Good character.

Good character cannot be dissociated from the other facts in the case by referring to it alone as being sufficient to generate a doubt; good character of the defendant is a fact in the case, in the light of which the other facts must be weighed. *Murphy v. State* (Sup. Ct. of Alabama), 252.

21. Record.

In the absence of a statement in the abstract that it contains all the evidence, the court cannot consider the objection that the verdict is not supported by the evidence. *State v. Strohbehn* (Sup. Ct. of Iowa), 378.

22. Where the record is fully presented, but without briefs or argument, it is the duty of the court to examine the record. *State v. Cox* (Sup. Ct. of Iowa), 379.

23. Where, upon an appeal from the district to the supreme court, the record does not contain the evidence or instructions of the district court, and no error is discovered, the judgment will be affirmed. *State v. Eifert* (Sup. Ct. of Iowa), 403.

24. Where the defendant undertakes to explain his connection or want of connection, with the deposit, and to show that it was received without his knowledge and against his will, any line of cross-examination which tends to contradict his testimony in chief, or which more fully discloses his connection with the deposit, is proper. *Id.*

25. Statement.

Where no excuse is shown for a failure to file a statement of facts within the time prescribed by law, such statement will not be considered. *Taylor v. State* (Ct. of Criminal App. of Texas), 542.

26. Supersedeas bond.

The condition of a supersedeas bond on appeal from such a judgment should be that defendant will pay all costs and charges which may be awarded against him on appeal, and, if the judgment is affirmed or the appeal dismissed, that he will abide by and perform the judgment appealed from, or surrender himself a prisoner, in execution of such judgment. *State v. Allrick* (Sup. Ct. of Minnesota), 344.

27. Waiver.

Defects in a motion for a new trial are not waived by a

special appearance for the purpose of moving for a dismissal of the motion for such defects. *State v. Pilgrim* (Sup. Ct. of Montana), 4.

28. Though the cross-examination is improper, the defendant waives any error connected therewith, by testifying, in the further progress of the trial, to the same facts without objection. *State v. Eifert* (Sup. Ct. of Iowa), 403.

ASSAULT.

1. Instruction.

An instruction, in such case, that malice means bad temper, high temper, or quick temper, and if the injury was inflicted from malice, then the jury should convict the defendant, is erroneous. *State v. Long* (Sup. Ct. of North Carolina), 360.

2. The rule, forbidding the use of excessive force, applies to school teachers and all in like situations, as it does to all other persons. *Id.*

3. An instruction, which authorizes and requires the jury to acquit if they are unable to tell with absolute certainty that the criminating evidence presented the truth, or if they have any doubts of guilt, whether a reasonable doubt or not, is properly refused. *Jackson v. State* (Sup. Ct. of Alabama), 559.

4. Where an assault and battery or simple assault are, in addition to assault with intent to murder, charged in the indictment, an instruction that the jury must believe from the evidence beyond a reasonable doubt that the defendant intended to kill the person upon whom the assault was alleged to have been committed before they could find him guilty as charged in the indictment, is properly refused. *Id.*

5. Whipping scholar.

Where a teacher inflicts upon a pupil such punishment as produces or threatens lasting mischief, or where he inflicts punishment, not in the honest performance of duty, but under

the pretext of duty to gratify malice, he is guilty of assault. *State v. Long* (Sup. Ct. of North Carolina), 360.

6. With intent to rape—Sufficiency of evidence.

The evidence, in this case, was held sufficient to convict defendant of assault with intent to commit a rape, and further held that, if defendant acted toward prosecutrix, before going upstairs, as she testified he did, the crime was then complete, though she consented to what transpired afterwards. *State v. De Long* (Sup. Ct. of Iowa), 303.

ASSAULT AND BATTERY.

Proof.

The evidence in a prosecution for malicious shooting with intent to kill was held sufficient to warrant a conviction. *Sapp v. Commonwealth* (Ct. of App. of Kentucky), 127.

ATTORNEYS.

Disbarment.

Any information for the removal of an attorney on the ground of his having been convicted of a misdemeanor involving moral turpitude, which simply charges that he has been convicted of a misdemeanor, but does not allege that any moral turpitude was involved in the acts constituting such crime is insufficient. *State v. Bannon* (Sup. Ct. of Oregon), 29.

BAIL.

1. Bond—Surrender of Defendant.

Under section 4587 of the Code, a bond on appeal from a judgment imposing a fine or imprisonment until it was paid, condition for the payment of said fine and the surrender of defendant, is not discharged merely by the surrender and imprisonment of defendant. *State v. Meier* (Sup. Ct. of Iowa), 1.

2. Where, under such a bond, the defendant is surrendered and imprisoned, an order of the governor, suspending the imprisonment does not estop the state from suing on the bond. *Id.*

BANKS.

1. Debtor and creditor.

The law presumes that the relation existing between a bank and its customer is that of ordinary debtor and creditor. *Nichols v. State* (Sup. Ct. of Nebraska), 487.

2. Deposit.

Whether a deposit made in a bank by its customers is a general or special one is a question of fact to be determined from the intention of the parties, but, in the absence of evidence, the law presumes such a deposit a general one. *Id.*

3. Insolvent.

The object of the enactment of sections 637, 638, Comp. St. 1895, was to prevent an insolvent banking association from borrowing money,—that is, receiving money on deposit, and becoming debtor therefor; but said section should not be so construed as to render an officer of a banking association guilty of a felony for permitting a debtor of the association to pay his debt thereto, even though the association is at the time, to the officer's knowledge, insolvent. *Id.*

4. N. was indicted for receiving a deposit in a bank of which he was cashier, knowing at that time the bank was insolvent. The state, to sustain the indictment, offered evidence which tended to show the existence of the bank that N. was its cashier; that it was insolvent, to his knowledge, on the 18th of February, 1895; and that on said date one M. deposited in said bank \$11. N. then offered to prove that when M. made such deposit he was overdrawn at the bank \$15.30. The court excluded the offer. Held, that the evidence offered tending to show that the deposit made by M. and accepted by N. was intended by the parties to apply towards the payment of M.'s debt to the bank; and that, so long as N. remained lawfully in charge of the bank as its cashier, he had the right to accept money in payment of any debt owing by any person to the bank; and that, therefore, the court erred in excluding the evidence offered. *Id.*

5. Presumption.

Where a customer of a bank, who has overdrawn, and thus stands indebted in open account to the bank, make a general deposit therein, the presumption of law is that such deposit was made and received towards the payment of such overdraft. *Id.*

BANKS AND BANKING.

1. Principal and agent.

A person whose agent, without his knowledge or authority, and in discharge of his express instructions, receives and accepts for his principal money as a deposit, will not by such act be rendered liable criminally for knowingly receiving and accepting the money, but the principal may, after coming into possession of all of the facts, so ratify the act theretofore done, as to make it binding upon himself and the basis of a criminal liability. *State v. Eifert* (Sup. Ct. of Iowa), 403.

2. When the principal, in such case, after full knowledge of all the facts, fails to repudiate the acts of his agent and takes no steps looking to a return of the deposit to the depositor, he then knowingly receives and accepts the deposit. *Id.*

BURGLARY.

Adjoining dwelling.

Where two stores which have a stairway between them, leading up from the street to the second story and descending at the rear, and the second story of each of which is occupied as a dwelling and is accessible only from the stairway, having no entrance from the stores, are within the provisions of section 9134 of 2 How. Ann. St. *People v. Van Dam* (Sup. Ct. of Michigan), 24.

COMPLAINT.

Constructive contempt.

A complaint is insufficient as the foundation of proceedings for constructive contempt which fails to state the facts constituting the alleged offense, and showing that the act of the accused amounts to a fraud upon the court, or tends to hinder

or embarrass it in the administration of justice. *Cooley v. State* (Sup. Ct. of Nebraska), 520.

CONSTITUTIONAL LAW.

Unlawful discrimination.

Act No. 74 of 1893, is not in conflict with the section of the United States Constitution prohibiting a state from discriminating against the citizens of other states. *People v. Gay* (Sup. Ct. of Michigan), 36.

CRIMINAL LAW.

1. Abortion.

To constitute abortion, it is not necessary that the foetus should have had vitality. *Commonwealth v. Surles* (Sup. Judicial Court of Mass.), 212.

2. Accomplice.

The court is not bound to advise the jury that generally it is unsafe to convict on the testimony of an accomplice, where such testimony is uncorroborated, though courts sometimes do so. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Mass.), 411.

3. Where the court instructs the jury that the witness, who furnished the principal evidence for the government, was an accomplice who had turned state evidence to avoid the consequences of his part in the affair, and that they were to take the circumstances into consideration in weighing his testimony, it may, in view of the above rule, refuse a request on the part of defendant for fuller instructions as to the uncorroborated testimony of an accomplice. *Id.*

4. Amendment.

The indorsement by the grand jury of an indictment as a "thru" bill instead of a "true" bill, is merely error in matter of form, and the court may cause such indictment, on objection thereof, to be forthwith amended. *State v. Williams* (Sup. Ct. of Louisiana), 202.

5. Appeal.

Affidavits presented as evidence on a hearing in proceedings in a case in the district court will not be examined in this court unless made of the record by being embodied in a bill of exceptions. *Korth v. State* (Sup. Ct. of Nebraska), 509.

6. Appeal—Harmless error.

An error, in permitting the owner of stolen property to testify as to its value, without first qualifying, is no ground for reversal, where the uncontradicted evidence shows its value to have been sufficient to render the crime a felony. *Rial v. State* (Ct. of Criminal App. of Texas), 154.

7. Appeal—Jurors.

The accused on appeal cannot assert that the jurors were not sufficiently informed as to the case to be tried to enable them to intelligently answer the questions on their examination, unless it is so stated in his bill of exceptions. *Commonwealth v. Surles* ((Sup. Judicial Ct. of Mass.), 212.

8. Upon such examination, it is error to refuse to put the jurors questions which add nothing material to the questions already put. *Id.*

9. Assistant counsel for prosecution.

Attorneys, whose alleged employment by defendant is not complete, but merely conditional, and who had made no investigation of his defense and sustained toward him no confidential relations growing out of not consulting with him in reference to the case, may be allowed to appear as assistant counsel in the case in behalf of the state. *State v. Lewis* (Sup. Ct. of Iowa), 380.

10. Bail.

Where defendant, on a preliminary examination for murder before a justice of the peace, is admitted to bail but fails to give bail, and subsequently on a preliminary trial before a city judge, is committed to jail without bail, he is not entitled to be released, after indictment for murder, on giving the bail fixed

by the justice of the peace. *Robinson v. Dickerson* (Sup. Ct. of Alabama), 551

11. Change of venue.

An application for change of venue because of prejudice and threats of mob violence was held, in this case, properly denied. *State v. Weems* (Sup. Ct. of Iowa), 282.

12. The refusal of a change of venue on the ground of prejudice, where the examination of the jurors shows no error in determining their competency by reason of opinions formed, is harmless. *State v. Hamil* (Sup. Ct. of Iowa), 301.

13. Collateral attack.

On a prosecution for larceny by a bailee, objection cannot be made to the regularity of the appointment of the guardian who made the demand, where the court making the appointment has jurisdiction of the subject-matter to the parties. *State v. Thompson* (Sup. Ct. of Oregon), 239.

14. Comments of counsel.

If a statement of the state's counsel is improper, special instruction should be requested by the defendant, directing the jury to disregard it. *Miller v. State* (Ct. Crim. App. of Texas), 157.

15. Complaint.

A written complaint in a prosecution before a justice of the peace is unnecessary. *People v. Bennett* (Sup. Ct. of Michigan), 28.

16. The district court, as well as the justices, has the power to receive complaints for maintaining nuisances. *Commonwealth v. Meskill* (Sup. Judicial Ct. of Mass.), 416.

17. Confessions.

Where confessions of the defendant are offered in evidence on a criminal prosecution, and it is claimed that they were not voluntary, the preliminary proof as to whether they were obtained by the influence of hope or fear may, if the evidence is

conflicting, be submitted by the court to the jury, under instructions to disregard the evidence, if satisfied that the confessions were involuntary. *Burdge v. State* (Sup. Ct. of Ohio), 428.

18. Continuance.

A defendant, upon his first application, is entitled to a continuance on the ground of the absence of material witness, where due diligence is shown, though there are other witnesses present who were with the absent witness at the time of the occurrence about which they are expected to testify. *Clark v. State* (Ct. of Criminal App. of Texas), 148.

19. A defendant, who fails to take any steps to secure the testimony of a witness living in another county within fifteen days before the trial, is entitled to a continuance on account of the absence of such witness. *Rial v. State* (Ct. of Criminal App. of Texas), 154.

20. An application for a continuance for absent witnesses to prove an alibi should show that the witness had opportunity to see and know the facts expected to be proved by them. *McCulloch v. State* (Ct. of Crim. App. of Texas), 164.

21. A conviction will not be disturbed because of a refusal for a continuance at the first term, while it is not shown that defendant was prejudiced. *State v. Weems* (Sup. Ct. of Iowa), 282.

22. County attorney.

The provisions of section 21, chapter 7, Comp. St. 1895, as follows: "In the absence, sickness, or disability of the county attorney and his deputies, the court before whom it is his duty to appear, in which there may be business for him, may appoint an attorney to act as county attorney, by an order to be entered upon the minutes of the court, but who shall receive no compensation from the county except as provided for in section six of this act (section 20, this chapter),"—held applicable to the prosecution of offenses by information, estab-

lished by the act of 1885 (Comp. St. 1895, c. 14, art. 1, § 69, subd. 33), and to warrant or authorize the trial court to appoint an attorney to perform the duties required of the county attorney in any particular case being prosecuted under the law in regard to prosecutions for offenses by information, whenever the conditions exist as stated in section 21, chapter 7, herein quoted; and that the enactment allowing such appointment is not in conflict with the provisions of section 10 of the bill of rights in the portion wherein it refers to the legislature providing by law for holding persons to answer for criminal offenses on information of a public prosecutor. *Korth v. State* (Sup. Ct. of Nebraska), 509.

23. Defendant's failure to testify—Comments on.

Comment by the state's counsel on the failure of the accused to testify, under section 1741 of the Code, is ground for reversal. *Sanders v. State* (Sup. Ct. of Miss.), 245.

24. Election.

In the case at bar the defendant was charged with embezzlement of the funds of a county while he was its treasurer, in an information containing several counts charging several and distinct embezzlement. He made a motion that the state be required to elect upon which of the several counts of the information it would prosecute him. The trial court withheld its ruling upon this motion until the close of the introduction of the state's testimony in chief, at which time the motion was sustained, and the state required to elect under which count of the complaint it would further proceed. Held, so far as the record discloses, there was no abuse of discretion in the action of the trial court. *Korth v. State* (Sup. Ct. of Nebraska), 510.

25. Evidence.

Where, on a murder trial, a witness for the state testifies only that defendant was at a certain house on the night of the homicide, the defendant is not prejudiced by the exclusion of questions on cross-examination as to whether the house was

not a sporting house, and the witness a prostitute, where it was not disputed that defendant was at the house at the time testified to, or that he was present when deceased was killed. *State v. Weems* (Sup. Ct. of Iowa), 282.

26. Where the plaintiff introduces evidence of a remark made by the defendant, the defendant may on his own behalf give the entire conversation, even though it may contain self-serving statements. *Emery v. State* (Sup. Ct. of Wisconsin), 468.

27. It is not error, in a prosecution for larceny, to charge that "the proof is deemed to be beyond a reasonable doubt when the evidence is sufficient to impress the judgment and understanding of ordinary prudent men with a conviction upon which they would act in their own most important affairs or concerns of life." *Polin v. State*, 16 N. W. 898; 14 Neb. 540; *Willis v. State*, 61 N. W. 254; 43 Neb. 102. *Lawhead v. State* (Sup. Ct. of Nebraska), 494.

28. Evidence—Good character.

In rebuttal of evidence of good character, the state is not allowed to prove, by a deputy sheriff, "that he nearly always had a warrant for the defendants arrest." *Murphy v. State* (Sup. Ct. of Alabama), 251.

29. Extortion.

The statute is directed against threats to accuse another of a crime, or to do any injury to the property of another with intent to extort. *State v. Lewis* (Sup. Ct. of Iowa), 380.

30. For jury—Intent.

Criminal intent is essential to constitute the crime of forgery, and the testimony bearing thereon is always a question for the jury. *People v. Wiman* (Ct. of App. of N. Y.), 243.

31. The conviction should be reversed where the charge renders uncertain the question as to whether "criminal intent" was essential to constitute the crime of forgery. *Id.*

32. Former acquittal.

An order by a magistrate on a preliminary examination is

not a bar to a second preliminary examination. *Robinson v. Dickerson* (Sup. Ct. of Alabama), 551.

33. Former adjudication—Bar.

A person cannot be punished for the same transgression under section 1997a and section 9286 of 3 How. Ann. St. *People v. Cox* (Sup. Ct. of Michigan), 32.

34. A prosecution on a charge laid out a date anterior to the former indictment is barred by a conviction upon such former indictment, where the offense charged is a continuing one. *Id.*

35. Former conviction.

Where a count in the indictment charges defendant with being an habitual criminal, and evidence relating thereto is introduced by the government but subsequently withdrawn from the consideration of the jury, the fact that the government was allowed to go to the jury only on a prior count cannot be said, in contemplation of law, to have injured the defendant, where the jury was carefully instructed not to regard any of the evidence relating to such count. *Commonwealth v. Cody* (Sup. Judicial Ct. of Mass.), 423.

36. Hired witness.

Where the defendant's arrest is the outgrowth of a purchase by the complainant with that object in view, it is unnecessary for the court to do more than inform the jury that such facts, are to be considered in determining the credit due to his testimony. *People v. Bennett* (Sup. Ct. of Michigan), 28.

37. Homicide.

Where the defendant fires the shot which results in the death of the deceased, or is an accomplice of the party who commits the deed, though the shot may be intended for a different person, the offense, in the eyes of the law, is the same as it would be if the shot had killed the person for whom it was intended. *Murphy v. State* (Sup. Ct. of Alabama), 252.

38. Homicide—Instructions.

Under Act February 11, 1893, it is error to instruct the

jury, on a trial for murder, that, if they believe the evidence, the defendant is guilty of murder in the first degree, though defendant offers no evidence, and all the evidence for the state tends to show only murder in the first degree. *State v. Gadberry* (Sup. Ct. of North Carolina), 81.

39. Homicide—Malice.

A defendant, who admits having made an incriminating threat, is entitled to show the circumstances under which it was made, the accompanying conversation, if any, which called it forth, and the information on which it was based. *Emery v. State* (Sup. Ct. of Wisconsin), 468.

40. Impeachment.

A conviction of a felony cannot be proved in the first instance by parol. *Murphy v. State* (Sup. Ct. of Alabama) 251.

41. Indictment.

The service of a copy of a process verbal or the action of the jury commissioners in drawing the jury, upon an accused person, is not required. *State v. Williams* (Sup. Ct. of Louisiana), 202.

42. The counts in an indictment for rape do not each charge the same offense, so as to render a dismissal of the first an acquittal of the second, where the first count is in the ordinary form of one for rape of a female over thirteen years of age, except that prosecutrix is described as a "female child," and the second count is for carnally knowing a female child under thirteen years of age, the same female being named in each count. *State v. Gaston* (Sup. Ct. of Iowa), 308.

43. In statutes which make different acts a crime, and state the acts disjunctively, all of the acts may be set out in the indictment in conjunctive form. *State v. Lewis* (Sup. Ct. of Iowa), 381.

44. An indictment for extortion is not sufficient because the threatening words, writings and printed communications are not set out therein. *Id.*

45. A number of separate and distinct felonies all of which may be tried in the same manner, which are of the same general character, require for their proof evidence of the same kind, and the punishment of the same nature, may be charged in separate counts of one information, and the party thus charged may be placed on trial for all of such counts at the same time. The question of whether the state will be required to elect between the several counts if a motion is made by defendant that it be so required will rest in the sound discretion of the trial court, and, unless it appears that there has been an abuse of such discretion in overruling the motion it will not be available as error. *Korth v. State* (Sup. Ct. of Nebraska), 510.
46. Indictment—Duplicity.
An indictment cannot be assailed for the first time on appeal upon the ground of duplicity. *Naanes v. State* (Sup. Ct. of Indiana), 433.
47. Indictment—Indorsement.
Section 4337 of the Code does not require that the names of witnesses before the grand jury who gave no material testimony should be indorsed on the indictment nor that the minutes of the testimony shall be returned and made of record. *State v. Lewis* (Sup. Ct. of Iowa), 380.
48. Indictment—Pendency.
The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause, nor is it a ground for a plea in bar, nor for a motion in arrest of judgment. *Commonwealth v. Cody* (Sup. Judicial Ct. of Mass.), 423.
49. In an indictment under section 22, chapter 202 of Public statutes, it is sufficient to charge that the defendant was armed with a pistol, without other allegations to show in what way it was dangerous. *Id.*

50. Where the indictment does not charge an assault with the pistol, it is unnecessary to allege how the weapon was used or intended to be used. *Id.*
51. Inquest.
The state may introduce, on the trial, only part of a statement made by defendant at the inquest, without introducing the whole of such statement. *Emery v. State* (Sup. Ct. of Wisconsin), 469.
52. Instruction.
Though a party is entitled to an acquittal if the jury have a reasonable doubt of his guilt, arising out of any part of the evidence, upon consideration of the whole evidence, a charge is misleading which instructs the jury that the defendant is entitled to the benefit of any reasonable doubt they may have as to the existence of any material fact in the evidence. *Murphy v. State* (Sup. Ct. of Alabama), 252.
53. A remark by the judge in his charge that the person robbed "identified them here at the trial without hesitation," was held not to be an expression of opinion in regard to the credibility of the witness. *Commonwealth v. Flynn* (Sup. Judicial Ct. of Mass.), 418.
54. There is no prescribed formula, under certain confidential method, which must be observed in framing instructions to a jury. *Howard v. State* (Sup. Ct. of Alabama), 447.
55. It is essential that the language in which they are expressed is not ambiguous, but is fair, accurate and otherwise in its meaning; and an instruction which has a tendency to mislead or to confuse the jury, if not explained so as to free it of this tendency, may be properly refused. *Id.*
56. It is error to give instruction infringing on the province of the jury. *Haskins v. State* (Sup. Ct. of Nebraska), 482.
57. An instruction in a criminal case is erroneous which has the effect to shift the burden of proof from the state to the accused. *Id.*

58. Where the jury have been fully advised respecting the distinction between grand larceny and petit larceny, it is not error for the trial court to add that they have nothing to do with the question of the penalty, and that it is their duty to render a verdict in accordance with the evidence, without regard to its effect upon the accused. *Ford v. State*, 64 N. W. 1082; 46 Neb. 390. *Lawhead v. State* (Sup. Ct. of Nebraska), 495.
59. Certain instructions held properly refused, the propositions therein embraced having been given by the court on its own motion in language quite as favorable to the accused. *Id.*
60. It is not error to refuse to give an instruction when the main purposesought to be effected by giving the instructions is clearly and fully embraced in and accomplished by other instructions, read to the jury, and it appears that no prejudice could have resulted to the rights of the complaining party by reason of such refusal. *Korth v. State* (Sup. Ct. of Nebraska), 511.
61. Instruction—Waiver.
Where the reading of the record of the board of supervisors has been waived by defendant, he cannot complain on appeal from conviction under act No. 207 of 1889, of instruction that the local option law was in force in that county. *People v. Bennett* (Sup. Ct. of Michigan), 28.
62. Intent.
When the intent or motive of a party in doing a particular act or making a declaration becomes material, it is permissible for the party to be sworn in regard to it. *Emery v. State* (Sup. Ct. of Wisconsin), 468.
63. Joinder.
Under section 54 of the Criminal Code, it was erroneous, over proper objections, to try a defendant upon the charge of burning a schoolhouse, joined with one for causing such burning to be done by another person. *Wendell v. State* (Sup. Ct. of Nebraska), 477.

64. Judgment—Suspension.

A court may suspend a judgment upon the understanding that a defendant will compensate an injured party by payment of money, but the collection of such damages cannot be enforced by imprisonment. *State v. Whitt* (Sup. Ct. of North Carolina), 371.

65. But when a judgment has been suspended on the agreement of the defendant to pay the costs, and the costs have not been paid, the judgment may be enforced for such failure. *Id.*

66. The defendant, at a subsequent term of the court, because of his failure to pay the costs, may have a different judgment entered against him for the former one, which was suspended, if the second is in diminution of the first judgment. *Id.*

67. Juror—Objection.

The defendant must, at the time the jury is empaneled, object to a juror, if disqualified, and reserve his bill of exceptions to the action of the court. *Hannaman v. State* (Ct. of Crim. App. of Texas), 546.

68. Jurors.

Jurors, who say that they have made up their opinions adverse to defendant from the rumor of the county, etc., and state definitely that they have no bias or prejudice against defendant but that they can have their minds blank and free from such opinions, and can and will give the prisoner a fair and impartial trial, uninfluenced by such opinions, according to the evidence, are competent. *State v. Douglass* (Sup. Ct. of App. of West Virginia), 523.

69. Jury.

The court, in its discretion, may discharge a jury where it is unable to agree, and the person accused may be tried again by another jury. *Commonwealth v. Cody* (Sup. Judicial Ct. of Mass.), 423.

70. Larceny—Identity.

Where the identity of a note offered in evidence is unques-

tionable, a variance, in the indictment, of two days in the date thereof is immaterial. *State v. Thompson* (Sup. Ct. of Oregon), 239.

71. Murder—Instructions.

A statement by the court to the attorneys, in the presence of the jury, that the result of a witness' murder case, where it was brought out in the examination of such witness that he had been indicted for murder and tried three times, had nothing to do with the case on trial, and that it could only be shown that he was indicted, had the same effect as though it had been addressed directly to the jury. *Howard v. State* (Ct. of Criminal App. of Texas), 152.

72. Ownership.

A purchaser of land, who agreed to pay, as part of its consideration, a note of the vendor secured by a mortgage on the land, is, on payment thereof, entitled to its possession, and the owner thereof, with an averment of an indictment charging one to whom it was delivered as attorney of the payee, and who converted it to his own use, with the crime of larceny by a bailee.

73. Preliminary examination.

The record of the proceedings in the examining court discloses that a complaint was filed, which contained a charge of the crime for which plaintiff in error was tried in the district court, and that he was arraigned thereupon, and waived examination. Held sufficient to show fulfillment of the requirements of section 585 of the Criminal Code in regard to preliminary examination. *Korth v. State* (Sup. Ct. of Nebraska), 510.

74. Preliminary examination—Witness.

Section 4786 of the Revised Statutes is directory only, and the examination of a sufficient number of witnesses to justify the magistrate in binding over the defendant for trial will be held to satisfy the statute. *Emery v. State* (Sup. Ct. of Wisconsin), 469.

75. Presence of one jointly indicted.

The question whether, on a trial for murder, the defendant's counsel should be allowed to have a person jointly indicted with defendant, and who was confined in the county jail, continually in court, ready for consultation, rests in the discretion of the trial court. *State v. Weems* (Sup. Ct. of Iowa), 282.

76. The supreme court will not, where all the reasons for excluding a person jointly indicted from the court room are not in the record, presume that those not appearing were insufficient to warrant his seclusion. *Id.*

77. Proof of value.

Where a note is negotiable and at the time of its conversion is not due, the fact that the defendant was able and did sell, and dispose of it for its face is sufficient proof of its value. *State v. Thompson* (Sup. Ct. of Oregon), 239.

78. Proving exceptions—Presence of accused.

There is no reason why the petitioner should be present at a hearing before a commissioner to prove the truth of his exceptions, unless he desires to be present, or to be heard in person or to testify in his own behalf. *Commonwealth v. Cody* (Sup. Jud. Ct. of Mass.), 423.

79. The court will not consider statements in the bill of exceptions which petitioner seeks to prove, where the bill alleged differs materially from that proven and is manifestly unfair. *Id.*

80. Rape.

The crime of having carnal connection with a girl under the age of sixteen years is rape, even though she gives her full consent so far as she is capable of consenting. *Commonwealth v. Murphy* (Sup. Jud. Ct. of Mass.) 213.

81. Rape—Instructions.

Failure to instruct is no error when a specific instruction was not asked, and the point was covered by the general charge,

so held on the trial of an indictment for carnally knowing a female child, where evidence was received of defendant's carnal knowledge of prosecutrix in another county, and the court failed to specifically instruct the jury that the evidence was admissible only to show the relation of the parties, but requested no such instructions, and the court charged that, before the jury could convict, they must be satisfied that he carnally knew prosecutrix at the time of the charge. *State v. Gaston* (Sup. Ct. of Iowa), 307.

82. Reasonable doubt.

A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as, in the graver transactions of life, would cause a reasonable and prudent amount of haste and decision. *Little v. People* (Sup. Ct. of Illinois), 118.

83. Where the acts of the accused as developed in the evidence are explainable upon a reasonable hypothesis consistent with his innocence, there is reasonable doubt of his guilt, entitling him to an acquittal. *Howard v. State* (Sup. Ct. of Alabama), 447.

84. A jurymen, in a criminal case, must use all the reason, prudence and judgment which a man would exercise in the most important affairs of life, and an instruction authorizing the use of any less degree of reason, prudence and judgment is erroneous. *Emery v. State* (Sup. Ct. of Wisconsin), 468.

85. Receiving stolen goods—Instruction.

An instruction, upon such trial, that, if the jury "find that all the facts and circumstances surrounding the receiving of the goods by defendant were such as would reasonably satisfy a man of defendant's age and intelligence that the goods were stolen, or if he failed to follow up such inquiry so suggested, for fear he would learn the truth and know the goods were stolen, then the defendant should be as rigidly held responsible as if he had actual knowledge," is not objectionable. *State v. Feurerhaken* (Sup. Ct. of Iowa), 392.

86. Record.

When an application for discharge is made by a party charged with the commission of a crime for the reasons stated in section 391 of the Criminal Code, that three or more terms of court have elapsed since the one at which the information was filed against him, without his being brought to trial, and the delay has not happened on its application or been occasioned by want of time to try it, the last two stated facts must appear affirmatively in the record by showing made, if not otherwise. In an examination by this court to determine the propriety of the action of the district court in overruling such application they will not be presumed, but the presumption that the court proceeded regularly and without error will prevail. *Korth v. State* (Sup. Ct. of Nebraska) 509.

87. Second degree.

If, upon a trial for murder in the first degree, there is no evidence tending to present a less degree of that offense, it is not the duty of the court to submit to the jury in its charge such degree. *Howard v. State* (Ct. of Criminal App. of Texas), 152.

88. Sentence.

A person, convicted of a violation of section 1 of act No. 8 of Public Acts of 1893, may be sentenced to imprisonment in the house of correction and branch of state prison. *People v. Smith* (Sup. Ct. of Michigan), 341

89. Statute—Repeal.

The act of the legislature of 1891 entitled "An act to provide for the depositing of state and county funds in banks" (Sess. Laws 1891, p. 347, c. 50) did not repeal so much of section 124 of the Criminal Code as is in relation to loaning county funds, and constitutes such loaning by an officer intrusted with its care and disbursement an embezzlement. *Korth v. State* (Sup. Ct. of Nebraska), 511.

90. Transcript.

Where a transcript of the proceedings at the preliminary examination, and the information upon which such examination was had, were lost or mislaid from the files of the district court, an order for the substitution of another transcript of such record and copy of the information was proper, and not erroneous. *Korth v. State* (Sup. Ct. of Nebraska), 510.

91. Trial—Summing up.

Defendant's counsel cannot, at the close of the testimony on the part of the state and before the introduction of the evidence for the defense, review the testimony on the part of the state for the purpose of showing that it does not warrant a conviction. *Emery v. State* (Sup. Ct. of Wisconsin), 468.

92. Venue.

Where, under section 1194 of the Code, the indictment charges an offense in a certain county, but there is no evidence of venue, the presumption is that it was committed in the state. *State v. Lytle* (Sup. Ct. of Nebraska), 78.

93. Upon the question of venue it will not be presumed that a place mentioned as the place where the offense was committed was situate within a certain county. *Hutto v. State* (Ct. of Criminal App. of Texas), 146.94. The venue will not be changed for the mere belief of the party or his witnesses that he cannot have a fair trial in the county; facts and circumstances must appear satisfying the court. *State v. Douglass* (Sup. Ct. of App. of West Virginia), 523.

95. Waiver.

In a criminal case "the accused shall be taken to have waived all defects which may be accepted to by a motion to quash or a plea in abatement by demurring to an indictment or pleading in bar or the general issue." See Criminal Code, § 444. And if a plea to the general issue has been entered, and has not, on

leave obtained, been withdrawn, a plea in abatement need not be entertained. *Korth v. State* (Sup. Ct. of Nebraska), 510.

96. Warrant—Local option law.

A warrant for the violation of the local option law (act No. 207 of 1889), issued by a justice of the peace, need not recite the evidence showing that such law was in force in the county, nor set forth the evidence showing that defendant was not a druggist, and therefore within the exception of the statute. *People v. Bennett* (Sup. Ct. of Michigan), 28.

97. Witness.

Where one jointly indicted is withdrawn from the witness' stand to consult with his lawyer, a refusal to allow defendant's counsel to join in the consultation is not prejudicial, where it appears that it was in defendant's interest, and the result thereof is the refusal by the witness to answer any questions, on the ground that his answers will tend to criminate him. *State v. Weems* (Sup. Ct. of Iowa), 283.

98. The objection that the attorney for the witness, and not the witness himself, made the claim of personal privilege, cannot be raised for the first time on appeal. *Id.*

CRIMINAL TRIAL.

Charge.

On a trial for murder, a charge that the jury must not give any thought to the fact that defendant did not testify in his own behalf is not contrary to section 3636 of the Code. That rule, in its letter or spirit, does not apply to the court. *State v. Weems* (Sup. Ct. of Iowa), 284.

DISTRICT ATTORNEY.

1. Assistant.

The fact that an attorney is prejudiced against a liquor traffic does not disqualify him from assisting in prosecutions for violations of the liquor law. *People v. O'Neill* (Sup. Ct. of Michigan), 336.

2. Sections 551, 560 of 3 How. Ann. St. do not prohibit the employment of additional counsel in preparing and prosecuting cases, involving misdemeanor to the grand jury, when, in the judgment of the board of supervisors, prosecuting attorney, and the court, such additional counsel is necessary. *Id.*

EVIDENCE.

1. Abortion.

Upon a trial for abortion, testimony that witness went to a newspaper office, bought a paper, looked at the advertisements, and, in consequence of seeing an advertisement, went to the defendant's office, is not objectionable, where he had testified previously that he asked defendant to procure the abortion. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Mass.), 412.

2. Admission.

A remark by the sheriff to defendant, where the answer partakes of the nature of an admission, is proper evidence against defendant, where it can only be understood in connection with the sheriff's remark to which it was a reply. *Emery v. State* (Sup. Ct. of Wisconsin), 469.

3. Arson.

Upon a trial of an indictment for arson, evidence of a threat of defendant to burn the building made fourteen months before the fire, was held, under the circumstances of this case, to have been properly admitted. *Commonwealth v. Crowe* (Sup. Judicial Ct. of Massachusetts), 420.

4. Upon the trial for arson, conversation and conduct of defendant, shortly after the fire, was admissible, in the discretion of the court, in connection with other evidence in the case, to show guilty knowledge on the part of defendant. *Id.*

5. Arson—Threats.

On a trial for arson, evidence of threats made by defendant to burn the building is admissible to establish motive in a case by circumstantial evidence. *State v. Lytle* (Sup. Ct. of North Carolina), 78.

6. Assault.

Where, in a prosecution for assault by a teacher upon his pupil, the offense is that the defendant as a teacher had a right to chastise his pupil, evidence that the assault was so severe as to cause the blood to flow from the pupil is admissible. *Kinnard v. State* (Ct. of Crim. App. of Texas), 176.

7. Bill of exceptions.

The only mode of making affidavits filed to sustain alleged grounds for a new trial a part of the record in a criminal case, is to embody them in a bill of exceptions. *Naanes v. State* (Sup. Ct. of Indiana), 433.

8. Burglary.

On the trial of an information for breaking into a store in the night, with intent to commit larceny, bottles of peppermint, brought from the store at the time of the trial, are admissible to identify similar bottles found in defendant's house after the burglary. *People v. Van Dam* (Sup. Ct. of Michigan), 24.

9. Carrying deadly weapons.

When the weapon is but a few minutes in the possession of a person, not with the intent of carrying concealed a deadly weapon, but with intention of keeping the weapon, he is not guilty of carrying concealed a deadly weapon. *State v. Chippey* (Ct. of General Sessions of Delaware), 345.

10. Confession.

A confession can never be received in evidence when the prisoner has been influenced by any threat or promise. Was held, where a person accused of crime was promised by the state's attorney that, if he would make a written statement of the facts, it should not be used against him, but, after he did so, the state's attorney was not satisfied with the statement and asked him to come to the latter's office, and make an oral statement, which the accused did under the belief that it would not

be used against him. *Robinson v. People* (Sup. Ct. of Illinois), 99.

11. A confession of the wife, made under the influence of and to her husband, is a confidential communication and incompetent as against her. *State v. Brittain* (Sup. Ct. of North Carolina), 365.

12. When a confession is made through hope or fear, subsequent confessions are presumed to proceed from the same influence, until the contrary is shown by clear proof, and until then the latter confessions are not admissible evidence. *Id.*

13. Contemporaneous crime.

Where, in a prosecution for burglary, the evidence shows the commission of contemporaneous theft by defendant, a charge, limiting the evidence as to the theft to its legitimate purpose, is proper. *West v. State* (Ct. of Criminal App. of Texas), 156.

14. Corroboration.

The refusal of the court to state the testimony corroborating an accomplice must directly connect defendant with the crime, is not ground for reversal, where the corroborative testimony is of itself sufficient to warrant conviction. *West v. State* (Ct. Crim. App. of Texas), 156.

15. A conviction for rape may be had on the uncorroborated testimony of the victim. *Curly v. Terr. of Arizona* (Sup. Ct. of Arizona), 222.

16. Documentary.

A copy of a hospital record, not authenticated in compliance with the requirements of section 466 R. S. 1894, is incompetent to show admission into such institution and symptoms of insanity. *Naanes v. State* (Sup. Ct. of Indiana), 433.

17. Proceedings of an examination by a commission as to the sanity of defendant, under section 3110 R. S. 1894, though duly certified and filed, are not evidence in a criminal prosecution. *Id.*

18. Dying declarations.

The existence of any expectation of recovery, however slight, makes dying declarations inadmissible. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Massachusetts), 412.

19. If such declarations are admitted in evidence, the court may consider whether the evidence is sufficient to warrant the findings on which the court proceeds, but cannot revise the findings of fact. *Id.*

20. If the evidence is excluded it is an end of the matter, unless some question of law is reserved. *Id.*

21. Examination of defendant.

A defendant can only be examined by the prosecution about the matters testified to in his direct examination. *Curly v. Territory of Arizona* (Sup. Ct. of Arizona), 222.

22. Extortion—Codefendant.

Where defendant and another are jointly indicted and charged with making threats to extort money, and the court carefully guards the rights of the defendant by proper instructions, evidence of the acts of his codefendant are properly admitted. *State v. Lewis* (Sup. Ct. of Iowa), 381.

23. Good character.

Evidence of good character is admissible, not only in a case where doubt otherwise exists, but may be offered for the purpose of creating a doubt. *People v. Van Dam* (Sup. Ct. of Michigan), 24.

24. Homicide.

Where, on a trial for murder, a witness who has testified that he did not see the shooting, it is error to permit persons to testify that witness told them out of court that he saw the shooting, and showed them the place where it was done. *Saylor v. Commonwealth* (Ct. App. of Kentucky), 130.

25. Where, in a murder case, the deceased's wife is a witness for the defendant, she may be asked on cross-examination if she

has not agreed to pay defendant's attorney's fees. *Magruder v. State* (Ct. of Crim. App. of Texas), 173.

26. Homicide—Clothing.

The clothing of the deceased, when fully identified, is admissible in evidence to show the course of the bullet which caused his death. *State v. Cadotte* (Sup. Ct. of Montana), 7.

27. Homicide—Dying declaration.

In the admission of the declarations of the victim as to the facts of a homicide, the utmost caution must be exercised to the end that it be satisfactorily established that they were made under the impression of almost immediate dissolution. *Carver v. United States* (U. S. Sup. Ct.), 463.

28. Omission to challenge evidence of dying declarations as not properly in rebuttal may waive the mere order of proof, but does not concede that the want of foundation can be excused for any reason. *Id.*

29. Identity.

On such trial, evidence as to identity of the defendant with the person committing the crime was held to be admissible. *State v. Lytle* (Sup. Ct. of North Carolina), 78.

30. Intent.

In such prosecution, evidence of the intention of the teacher in chastising the pupil is admissible. *Kinnard v. State* (Ct. of Crim. App. of Texas), 176.

31. Joint indictment.

Where an alleged accomplice was tried at same time with defendant, it is discretionary with the court to admit against the accomplice evidence not admissible against defendant, provided it instructs the jury not to consider such evidence against the latter. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Massachusetts), 412.

32. Knife.

On a trial for murder, a knife which is not clearly identified as the one claimed to have been in the hands of the deceased,

when killed, is not admissible in evidence. *State v. Cadotte* (Sup. Ct. of Montana), 7.

33. Material.

Upon trial for sheep stealing, evidence of a witness that he had seen several sheep of the prosecutor with the marks changed to the mark of the defendant, is not subject to any just objection. *Howard v. State* (Sup. Ct. of Alabama), 447.

34. Notice— Produce.

Where no notice to produce is given, parol evidence of the contents of bills of goods is admissible. *People v. O'Neill* (Sup. Ct. of Michigan), 337.

35. Objection.

Such declaration is admissible if made while hope lingers, if it is afterwards ratified when hope is gone, or if made when the person is without hope, though he afterwards regains confidence. *Carver v. United States* (U. S. Sup. Ct.), 463.

36. The repetition of a dying declaration cannot itself be admitted as a reiteration of the alleged facts, if made when hope has been regained. *Id.*

37. Perjury.

On a prosecution for perjury committed at defendant's trial for assault, wherein, as it is alleged, he falsely swore that the person assaulted had presented a pistol at him at the time of assault, evidence that such person had previously insulted defendant's wife is inadmissible. *Pearson v. State* (Ct. of Criminal App. of Texas), 148.

38. Perjury.

The falsity of a statement can be, on a trial for perjury, established by circumstantial evidence, but this must be done by the testimony of at least two credible witnesses, or by one credible witness strongly corroborated, as the law requires. *Plummer v. State* (Ct. Crim. App. of Texas), 159.

39. Physician.

A physician, who attended the person robbed for two days
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after the robbery, may testify that she was hysterical when he saw her. *Commonwealth v. Flynn* (Sup. Judicial Ct. of Massachusetts), 418.

40. A witness, if an expert, may give a description of the appearance of the person robbed and of her apparent physical condition before and after the robbery. *Id.*

41. Proof.

The evidence, in this case, was held to be sufficient to sustain a conviction. *Curly v. Territory of Arizona* (Sup. Ct. of Arizona), 222.

42. Rape.

On the trial for rape alleged to have been committed by a father upon his daughter, it is competent to show that complainant's motive in charging defendant was to shield a lover, whose attentions were paid to her against her father's will. *Curly v. Territory of Arizona* (Sup. Ct. of Arizona), 221.

43. Receiving stolen goods.

Upon the trial of an indictment for receiving certain stolen goods knowing them to have been stolen, the rule that it is improper upon the trial of a party for one offense to give proof that he is guilty of another on evidence having no connection with the offense on trial, does not apply to a case where it is difficult, if not impossible, to separate the transaction. So held where the evidence tends to identify the goods covered by the indictment, and it appears that the proof in reference thereto justifies the inference by the jury that all the goods were taken from the same place, by the same person, at the same time, and were received by defendant from the same person at the same time. *People v. McClure* (Ct. of App. of New York), 216.

44. It is competent, on the trial for receiving stolen goods to show by witnesses, who actually stole the goods, the previous course of dealing between them and the defendant. *State v. Feurerhaken* (Sup. Ct. of Iowa), 391.

45. Refreshing memory.

It is competent, in case of unwilling witnesses, for the prosecution to call the attention of such witnesses to their depositions given on other occasions, for the purpose of refreshing their memories, and, if possible, eliciting the truth; but this cannot be done for the purpose of impeachment. *People v. O'Neill* (Sup. Ct. of Michigan), 337.

46. A witness may be compelled to disclose the evidence he gave before the grand jury. *Id.*

47. *Res gestae*.

The statements of the defendant, made half an hour after the alleged crime, are admissible in his favor as part of the *res gestae*. *McCulloch v. State* (Ct. of Crim. App. of Texas), 164.

48. Statements made by the teacher half an hour after the alleged assault are inadmissible in his favor, as part of the *res gestae* upon such trial. *Kinnard v. State* (Ct. of Crim. App. of Texas), 176.

49. Robbery.

Upon an indictment for robbery, it is always competent to show the effect of the assault upon the person assaulted. *Commonwealth v. Flynn* (Sup. Judicial Ct. of Massachusetts), 418.

50. Secondary.

Where the court is warranted in assuming that the defendant refused to admit the receipt of, or to produce, a paper, he is justified, irrespective of any question of the sufficiency of the notice to produce it, in admitting secondary evidence of its contents. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Massachusetts), 412.

51. Seduction.

On trial of an indictment for seduction, letters written to prosecutrix during her pregnancy, at defendant's dictation, are admissible against him. But where no indorsement or approval of its writing by him was shown, it is improperly

admitted in the evidence against him. If this admission is not prejudicial to defendant, the judgment will not be reversed for that reason. *State v. Sibley* (Sup. Ct. of Missouri), 133.

52. Similar attempts.

Upon the trial of an indictment for conspiracy to commit extortion, the prosecution may be permitted to introduce evidence concerning other instances of extortion and attempts to extort for the purpose of aiding the jury in determining with what intent defendant acted in the transaction set out in the indictment. *State v. Lewis* (Sup. Ct. of Iowa), 381.

53. Specific acts.

Upon the trial of such an indictment, evidence of specific acts of unchastity of the prosecutrix with others is not admissible. *State v. Sibley* (Sup. Ct. of Missouri), 133.

54. Statements of prosecutrix.

Statements, testified to have been made by the prosecutrix while she claimed she was out of her mind in consequence of medicine administered by defendant to cause of abortion, are inadmissible. *State v. Sibley* (Sup. Ct. of Missouri), 133.

55. Nor are such statements admissible for the purpose of corroborating the prosecuting witness, as they are not a part of the *res gestae*. *Id.*

EXCISE.

1. Agent of prosecuting witness.

It is incumbent on the defendant, in order to excuse himself on the ground that he was the agent of the prosecuting witness, to satisfy the jury that he did actually buy from another in the capacity of such agent, and not as the agent or employe of a person who furnishes the liquor, or as the agent both of such person and the prosecuting witness.

2. Burden.

The burden of showing a license is on the defendant. *State v. Smith* (Sup. Ct.), 369.

3. Druggist.

A druggist who has complied with the law by filing a bond, while he may be guilty of an offense, is not guilty of an offense in keeping his drug store. *Maynard v. Eaton* (Sup. Ct. of Michigan), 485.

4. Indictment.

If it is sought to charge him with a violation of the law in unlawfully selling, the offense should be specified in such manner that the accused may know what he is called upon to meet. *Maynard v. Eaton* (Sup. Ct. of Michigan), 485.

5. Instruction.

Where the minor did not name the party who sent him when he purchased the beer, an instruction that, if somebody sent him, it is not a sale to the minor, is unnecessary. *Hannaman v. State* (Ct. of Crim. App. of Texas), 546.

6. Presumption.

In such case, proof of the sale raises a presumption that it was solicited. *State v. Smith* (Sup. Ct. of North Carolina), 369.

7. Sale.

Where defendant takes the money of another and furnishes him whisky for it, it is prima facie a sale whether the liquor is delivered at that or another time. *Id.*

8. A person may be convicted of unlawfully keeping intoxicating liquor for sale without proof that he actually sold any liquor, or offered or exposed it for sale. *Commonwealth v. Meskill* (Sup. Judicial Ct. of Massachusetts), 417.

9. Sale of quantity.

The sale of two pints of whisky to the same purchaser, delivered at the same time, is not a sale of a less quantity than a quart within the meaning of section 4856 Sand. & H. Dig., where the circumstances are not such as to show that an evasion of the law was intended. *Bach v. State* (Sup. Ct. of Arkansas), 124.

10. Sales to minor.

Where the state proves the sale to the party to whom the beer is sold is a minor, the burden is upon the defendant to introduce the written consent or permission of the parent or guardian. *Hannaman v. State* (Ct. of Crim. App. of Texas), 546.

FEDERAL CONSTITUTION.

1. Article 8 of the Federal Constitution has no application to crimes against the laws of a state. *Commonwealth v. Murphy* (Sup. Jud. Ct. of Massachusetts), 213.

2. Chapter 466 of 1893.

Chapter 466 of the Statutes of 1893 does not inflict a cruel and unusual punishment. *Id.*

3. Knowledge of age.

To constitute the offense prescribed by chapter 466 of the Statutes of 1893, is not necessary to show that the defendant knew, or had good reason to believe, that the girl was under sixteen years of age. *Id.*

4. Responsibility.

One who intentionally commits a crime is criminally responsible for the consequences, if the act proves different from that which he intended. *Id.*

FORGERY.

1. Indictment.

In an indictment for forgery of a promissory note, the omission, in setting it out according to its "purport and value" (Rev. St., § 7218), of a power of attorney to confess judgment, attached to the note, is not a variance material to the merits of the case, nor prejudicial to the defendant, and, therefore, not a ground of acquittal. *Id.*, § 7216. *Burdge v. State* (Sup. Ct. of Ohio), 428.

2. Evidence.

Where a party is indicted for the forgery of a note, evidence

that the defendant released a judgment he had taken on the note, without consideration, after being charged with the forgery, is competent on the question of his guilt. *Id.*

3. Information.

It is sufficient in an information for forgery to charge the intent to defraud in general terms. It is not necessary to state or prove an intent to defraud any particular person. *Roush v. State*, 51 N. W. 755; 34 Neb. 325, reaffirmed, and followed. *Morearty v. State* (Sup. Ct. of Nebraska), 503.

4. Instruction.

The giving of an instrument which submits to the jury the existence or nonexistence of a fact material to the issues in the case on trial, when no evidence has been introduced which would support a finding of its existence, is error for which the judgment may be reversed. *Id.*

5. Order.

An order to deliver to bearer a specific article of personal property is within the definition of section 145 of our Criminal Code in relation to forgery, as "any order or any warrant or request for * * * the delivery of goods and chattels of any kind." *Id.*

6. The order or request upon which the charge in this case was founded to let bearer have a designated article of personal property held to be the subject of forgery, though not addressed to any person by name; and where such an order is set forth by copy in an information charging its forgery, and it is apparent from its face or its terms that there was a possibility by its use to deprive some person of property rights, the information is sufficient without averment of any facts extrinsic to the instrument to extend or explain its terms. *Id.*

FORMER ADJUDICATION.

Acquittal.

A judgment of acquittal, rendered in the case in which the alleged perjury was committed, is not admissible on a trial for

- perjury to show the guilt or innocence of the defendant. *State v. Caywood* (Sup. Ct. of Iowa), 276.

HABEAS CORPUS.

1. Appeal.

An appeal to a higher court from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing it, and a state may accord it to a person convicted of crime upon such terms as it thinks proper. *Kohl v. Lehlback* (U. S. Sup. Ct.), 62.

2. Constitutional law.

The provision of the New Jersey statute that a juror shall not be excepted to on account of his citizenship after he has been sworn, does not violate the state Constitution. *Id.*

3. Judgment.

A judgment of conviction is not invalid because one of the jurors was an alien, where no objection was made to him on this account. *Id.*

4. Extradition.

A warrant of extradition of the governor of a state, issued upon the requisition of a governor of another state, accompanied by a copy of an indictment, is *prima facie* evidence that the accused had been indicted, and was a fugitive from justice, and, if the court in which the indictment was found had jurisdiction of the offense, is sufficient to make it the duty of the courts of the United States to decline interposition by writ of habeas corpus, and to leave the question of the lawfulness of the detention of the prisoner in the state in which he was indicted to be inquired into and to determine, in the first instance, by the courts of the state. *Whiten v. Tomlinson* (U. S. Sup. Ct.), 46.

5. Perjury.

An indictment for perjury, which gives the name of the officer before whom the alleged false oath was taken, avers that he was competent to administer an oath, sets forth the

very words of the statement alleged to have been willfully and corruptly made by the accused, and charges that such false statement was part of a disposition given and subscribed by the accused before that officer and was material to an inquiry then pending before, and within the jurisdiction of, the commissioner of pensions of United States, is sufficient under the statute. *Markham v. United States* (U. S. Sup. Ct.), 71.

6. Petition.

In a petition for a writ of habeas corpus, verified by the oath of the petitioner, as required by section 754 of the Revised Statutes, facts duly alleged may be taken to be true, unless denied by the return or controlled by other evidence. *Whiten v. Tomlinson* (U. S. Sup. Ct.), 46.

7. The general allegations in the petition that the petitioner is detained in violation of the Constitution and Laws of the United States and of the Constitution and Laws of one of the states, is held without due process of law, or averments of mere conclusions of law, and not as matters of fact, *Id.*

8. An allegation in the petition that in August and September, 1893, the petitioner was tried before a local court in New Haven upon the same charge, and, upon a full hearing, was discharged by the court, affords no ground for his discharge on habeas corpus. *Id.*

9. The fact that an indictment, actually presented by the grand jury of the court lacked the words "A true bill," and was found by the grand jury by mistake and misconception, is a proper subject of inquiry in the courts of the state, but affords no ground for interposition by the courts of the United States by writ of habeas corpus. *Id.*

10. Recognizance.

The question whether a recognizance, entered into for one's appearance in the state court on the day appointed by law for the beginning of the court term, requires his appearance on the subsequent day of the term, is a question for the state court,

rather than for the Federal court upon a petition by writ for habeas corpus. *Id.*

11. Record.

A letter written by the judge to petitioner's counsel in regard to an amendment of the record has no place in the record and its insertion therein does not show such amendment. *Id.*

12. Residence.

The question whether the word "resides," as used in section 962 of Com. St., implies domicile or only presence in the county, is for the decision of the state court. *Id.*

13. Return of sheriff.

Any defect in the return of the sheriff to the writ of habeas corpus in not setting forth the indictment and the warrant of extradition, as ground for the detention of the prisoner, affords no reason why the courts of the United States should take the prisoner out of the custody of the authorities of the United States. *Id.*

14. Section 5396.

Section 1025 of 2 Rev. St., does not dispense with the requirement of section 5396 that an indictment for perjury shall set forth the substance of the offense charged. *Markham v. United States* (U. S. Sup. Ct.), 72.

15. State court.

Where a person is in custody, under process from a state court of original jurisdiction, for an alleged offense against the laws of such state, and it is claimed he is restrained of his liberty in violation of the Constitution of the United States, the circuit court has a discretion whether it will discharge him, upon habeas corpus, in advance of the trial in the court in which he is indicted; but that discretion is to be subordinated to any special circumstances requiring immediate action. *Whiten v. Tomlinson* (U. S. Sup. Ct.), 46.

16. Except in such peculiar and urgent cases, the courts of the United States will not discharge the prisoner by habeas corpus

in advance of a final determination of his case in the courts of the state, and, even after such final determination in those courts, will generally leave the petitioner the usual and orderly course of proceeding by writ of error from the Federal supreme court. *Id.*

17. A state court, which has jurisdiction of the offense charged and of the accused, must determine whether an indictment sufficiently charges the crime of murder in the first degree. *Kohl v. Lehlback* (U. S. Sup. Ct.), 62.
18. Whether a writ of error in criminal cases punishable with death can or cannot be prosecuted under the various acts of New Jersey, unless allowed by the chancellor of the state under section 83 of the Criminal Procedure Code, and, if so, under what circumstances and on what conditions, are matters for the state courts to determine. *Id.*
19. The supreme court of the United States can neither anticipate nor overrule the action of the state courts as to the right to review in an appellate court, since a denial of such a right altogether would constitute no violation of the Constitution of the United States. *Id.*

HIGHWAYS.

1. Indictment—Duplicity.

An information, under said statute, which charges the offense as having been committed by failure to have a man in front of the engine, and also in failing to stop, is not bad for duplicity. *State v. Kowolski* (Sup. Ct. of Iowa), 397.

2. Instruction.

Upon such trial, an instruction that a person operating such engine on the highway must stop it for the passage of teams passing either way, unless to stop would be dangerous to life or limb, is not objectionable. *Id.*

3. Steam engines.

Under chapter 68, Acts 24 Gen. Assem., the law as to the

stopping of the engine and the keeping of a man in front is alike applicable to all teams that are to pass the engine, whether from front or rear. *Id.*

4. Steam engines—Defense.

The avoidance of danger by leaving the traveled track is not a valid excuse for the violation of the specific provision in the statute as to the crossing of culverts with such engine. *Id.*

5. Upon the trial of an information under said act, the refusal of the court to permit defendant to show that he kept a person on the lookout, but in a different way from that prescribed by law, is right. *Id.*

HOMICIDE.

1. Defense.

The real or apparent necessity to take life, which is brought about by the design, fault or contrivance of the defendant, is no excuse. *Rogers v. State* (Sup. Ct. of Tennessee), 534.

2. Even though sufficient cause does exist for reasonable apprehension, but the killing is not done under the fear it is calculated to inspire, or the fear is simulated, this defense will not be available. *Id.*

3. Defense of dwelling house.

Where the deceased enters the dwelling house of defendant and first fires upon him, after he had retreated to avoid deceased, he has a right to take the deceased's life. *Saylor v. Commonwealth* (Ct. App. of Kentucky), 130.

4. Instruction.

The instruction, in this case as to the effect of anger or adequate provocation in reducing the killing to manslaughter, was held to be proper. *Magruder v. State* (Ct. of Crim. App. of Texas), 173.

5. An instruction which recites material evidence that is not before the jury in such a way as to imply that the judge trying the case understands that such evidence is in the record, is erroneous. *Williams v. State* (Sup. Ct. of Nebraska), 499.

6. The effect of the evidence and the inferences deducible therefrom are for the jury, and for the court to instruct the jury that the evidence establishes a certain controverted fact in issue is an unwarranted assumption of the functions of the jury. *Id.*
7. Where, on the trial of a murder case, in which the defense is temporary insanity, the court undertakes to detail in an instruction what evidence the jury may consider in determining whether the prisoner knew the killing was wrong, the court must impartially recite the material evidence offered both by the state and the prisoner to sustain their respective theories of the homicide. *Id.*
8. It is prejudicial error for the court in such a case to group together in an instruction the important material facts put in evidence by the state as to the prisoner's sanity and omit all mention of the evidence produced by the prisoner tending to traverse that of the state. *Id.*
9. A charge upon the question of negligence that "the degree of care and caution required to avoid danger is such as a man of ordinary prudence would have used under like circumstances," is sufficient. *Morris v. State* (Ct. of Crim. App. of Texas), 548.
10. Instruction—Provocation.
Where defendant and deceased had been previously on good terms, and the time from the beginning of the difficulty until the fatal shot was very short, an instruction that the provocation must arise at the time of the commission of the offense was held not to be improper, in view of the further instruction to consider in connection therewith all the facts and circumstances in evidence in the case. *Graham v. State* (Ct. of Crim. App. of Texas), 543.
11. Negligence—Evidence.
On a trial for negligent homicide in rapidly driving the wagon in which defendant was riding, defendant's declarations

made a short time after, and at the place of, the injury, as to decedent's acts and his own opinion thereof, was part of the *res gestae*, and admissible to characterize the defendant's driving on that occasion as negligent. *Morris v. State* (Ct. of Crim. App. of Texas), 548.

12. Notice.

Where the facts show that the deceased was riding in defendant's wagon, and that defendant drove his team in a furious and rapid manner, the latter is charged with notice that his acts endangered the life of the deceased. *Id.*

13. Proof.

The defendant, in this case, was held to have fired the fatal shot without sufficient or reasonable ground to apprehend danger to himself. *Rogers v. State* (Sup. Ct. of Tennessee), 534.

14. Self defense.

Refusal to give especial charge on manslaughter or self defense is proper, where there are no facts in the case authorizing it or involving the question of self defense. *Graham v. State* (Ct. of Crim. App. of Texas), 543.

15. Self defense—Instruction.

On a trial for homicide in which the defendant, by his evidence on the trial, was attempting, in part, to justify the homicide on the ground of self defense, an instruction which emasculates the evidence given by the defendant upon the plea of self defense and then charges upon the weight of the fragments left, is erroneous. *Wilburn v. State* (Sup. Ct. of Mississippi), 207.

16. Volition.

Whether the deceased was thrown and hurled from the wagon without any volition on his part, but simply on account of the speed of the driving, or whether, in an attempt to get out of the said vehicle, he was violently thrown therefrom, the defendant is, in either event, liable for his negligence in

driving at such a furious rate of speed. *Morris v. State* (Ct. of Crim. App. of Texas), 548.

HUSBAND AND WIFE.

1. Excise.

A husband is liable for keeping a liquor nuisance while his wife kept intoxicating liquors for illegal sale on his premises and with his knowledge, unless he uses reasonable means to prevent her from carrying out such intent. *Commonwealth v. Walsh* (Sup. Judicial Ct. of Massachusetts), 209.

2. The criminal intent involved in the commission of such crime is the intent to keep the tenement, knowing and suffering it to be a common nuisance, and it is immaterial who does the other unlawful acts which make it a common nuisance. *Id.*

INDICTMENT.

1. Accomplice—Corroboration.

It is not necessary that an accomplice should be corroborated to every material fact to which he testifies. *State v. Feurerhaken* (Sup. Ct. of Iowa), 391.

2. The corroboration need not be by the testimony of witnesses alone; it is sufficient if it be by circumstances or circumstantial evidence. *Id.*

3. Banks and banking.

Where the act complained of is stated in the indictment with such a degree of certainty, in ordinary and concise language, and in such a manner, as to enable a person of common understanding to know what is intended to be charged, it is competent. *State v. Eifert* (Sup. Ct. of Iowa), 403.

4. An indictment, which charges that defendant, being engaged in the banking and deposit business, and insolvent, knowingly accepted from one M. a deposit, sufficiently states who was the owner of the money deposited and who was defrauded. *Id.*

5. Bribery.

Under sections 950 and 952 of the Penal Code, an indict-

ment, which charges that defendant did give a bribe to a certain supervisor, with intent to corruptly influence him in a certain matter, is not sufficient. *People v. Ward* (Sup. Ct. of California), 19.

6. An indictment is good if it alleges all the facts or acts necessary to constitute the particular offense charged, in the language used by the legislature in defining it. *Id.*
7. An indictment for bribery should aver that the defendant gave something of value or advantage, present or prospective, or some promise or undertaking, or did some act, described by the statute as constituting the offense. A mere use of the language of section 165 of the Penal Code, which prescribes the punishment is not charging the offense "in the words of the statute defining it." *Id.*
8. Though the commissioner may have been perfectly willing to be bribed, the defendant would be guilty of offering the bribe. *Rath v. State* (Ct. Crim. App. of Texas), 162.
9. Under an indictment which charges defendant with offering to bribe a county commissioner to vote for the building of a court house which the commissioner's court had in contemplation, it is not necessary to allege that the defendant offered to bribe the commissioner to do or omit to do an act in violation of his duty as such officer. *Id.*
10. The offense is complete if he offers to bribe the commissioner to vote a certain way on a matter upon which by law he was called upon to vote, and he would be guilty whether it would be for the benefit of the said county or not, or whether it would not be the duty of such officer to so vote. *Id.*

11. Burglary.

An indictment for burglary may be laid according to the common law, and without referring to the facts upon which the imposition of the higher penalty depends, but in such case the punishment cannot exceed the less penalty. *People v. Shaver* (Sup. Ct. of Michigan), 316.

12. Where the facts are supposed to warrant it and the higher penalty is contemplated, the crime must be described with the attending facts which justify the penalty. *Id.*

13. Demurrer.

On overruling a demurrer to a plea in abatement on an indictment, the state may rely on the merits. *People v. O'Neill* (Sup. Ct. of Michigan), 336.

14. Duplicity.

An indictment for carrying a pistol may, in the same count, charge more than one method of committing the offense. *Allphin v. State* (Ct. Criminal App. of Texas), 145.

15. Though the words are used disjunctively in the statute which makes it a crime for any one to buy, receive or aid in concealing any stolen goods, etc., it is good pleading to use them in the indictment in conjunction, and such use does not involve more than one charge. *State v. Feurerhaken* (Sup. Ct. of Iowa), 391.

16. In such indictment, it is not necessary to name the person from whom the goods were received. *Id.*

17. Where several offenses are of the same general nature and belong to the same family of crimes, and the mode of trial and nature and degree of punishment are the same, they may be joined or included in different counts of the same indictment. *Howard v. State* (Sup. Ct. of Alabama), 447.

18. Election.

The court should never interfere, either by quashing the indictment or by compelling an election when the joinder is simply designed and calculated to adapt the pleading to the different aspects in which the evidence on the trial may present a single transaction. *Howard v. State* (Sup. Ct. of Alabama), 447.

19. Embezzlement.

Where the words charging defendant with being a postoffice employe are material in an indictment which charges, under

Act March 3, 1875,, the embezzlement of a certain sum of money, belonging to the United States, by defendant, it must be averred that the money came into his hands by virtue of such employment. *Moore v. United States* (U. S. Sup. Ct.), 38.

20. If the words of such indictment charging defendant's employment, are treated as surplusage, the property embezzled must be identified with particularity. *Id.*

21. Forgery—Proof.

Under an indictment which does not allege that a fictitious person was intended to be defrauded or injured but alleges an intent to defraud generally proof can be made that the party whose name was signed to the instrument was a fictitious person or company. *Johnson v. State* (Crim. Ct. App. of Texas), 168.

22. Gaming.

An allegation in an indictment, under revised Code of 1874, p. 786, that it is a game of chance, is unnecessary. *State v. Norton* (Ct. of General Sessions of Delaware), 347.

23. Homicide.

An indictment for homicide, which is in the form allowed by section 1, chapter 144 of Code, will not be held bad. *State v. Douglass* (Sup. Ct. of App. of West Virginia), 523.

24. Instruction.

Where, on a prosecution for carrying a pistol, there is no plea or evidence of justification, and the only issue is whether he had a pistol at the time, a charge that if the jury believes that at the time defendant had ground for fearing an attack, etc., he should be acquitted, is erroneous and prejudicial to defendant. *Allphin v. State* (Ct. Criminal App. of Texas), 145.

25. Insufficiency.

An indictment under the statute, direct and certain as to time, place, and the party charged, is ordinarily sufficient, if the offense is described substantially in statutory language,

fully apprising the accused of the nature and particular circumstances of the charge against him. *State v. Isaacson* (Sup. Ct. of South Dakota), 311.

26. Larceny.

An indictment for stealing the property of "John F. Hinckley" may be sustained by proof that it belonged to "J. F. Hinckley," where there is no reasonable doubt as to the identity. *Little v. People* (Sup. Ct. of Illinois), 118.

27. Different criminal acts, constituting parts of the same transaction, such as burglary with intent to steal particular property and the stealing of such property, may be charged in the same indictment or count thereof. *Aiken v. State*, 59 N. W. 888; 41 Neb. 263. *Lawhead v. State* (Sup. Ct. of Nebraska), 494.

28. An indictment, under section 3712 of the Code, must describe the offense created by the statute, either in the terms of the statute itself or in language substantially equivalent thereto. *Duff v. Commonwealth* (Sup. Ct. of App. of Virginia), 538.

29. The gravamen of the offense under this section is that the property levied upon is fraudulently removed, destroyed, received or secreted with intent to defeat the levy or distress. *Id.*

30. It is not enough to charge that the act was done unlawfully or injuriously, but it is necessary either to frame the indictment so as to charge a larceny of the goods, or to follow substantially the language of the statute and charge the act as having been fraudulently done. *Id.*

31. Larceny—Bailee.

An indictment, which charges that defendant, being "the bailee and trustee" of a note, the property of another, embezzled and converted it to his own use, charges but one crime and that crime under section 1800 of the Code. *State v. Thompson* (Sup. Ct. of Oregon), 239.

32. Names of witnesses.

Although the statute requiring the names of all witnesses examined before the grand jury to be placed at the foot of the indictment or indorsed thereon is mandatory, the overruling of a motion to quash, made after plea, and for the reason that a name has been omitted, is not allowed to testify on the part of the state, and it clearly and affirmatively appears that the accused was not injured by the exercise of the court's discretion. *State v. Isaacson* (Sup. Ct. of South Dakota), 311.

33. Perjury.

An indictment for perjury, which charges that defendant, while on trial on a certain date, before a designated court, having jurisdiction, under an indictment for unlawfully selling liquor, and while a witness under oath, administered by the duly-authorized clerk of said court, falsely swore that he did not on a certain date sell spirituous liquors, knowing it to be false, the same being a material issue in the case, is sufficient under section 1363 of Ann. Code. *State v. Jolly* (Sup. Ct. of Mississippi), 246.

34. Proof.

Under an indictment in the usual form, averring that the offense was committed with deliberation, premeditation and malice aforethought, and without averments as to its having been committed in an attempt to perpetrate robbery, the facts as to how the murder was committed, including the attempt to rob, may be shown. *State v. Weems* (Sup. Ct. of Iowa), 284.

35. Proof of office.

In such case, it is not necessary, in order to show that the party offered to be bribed was a commissioner, to introduce the record of his election and qualification. *Rath v. State* (Ct. of Crim. App. of Texas), 162.

36. Prostitution.

Where a female takes a child under fifteen years of age and

uses it for the purpose of sexual connection, she is guilty under act March 29, 1889. *State v. Davis* (Ct. of General Sessions of Delaware), 348.

37. Robbery.

An information, which charges the defendant with having robbed another of a designated sum of lawful money, the currency of the United States, charges a statutory offense, within the intendment of Rev. St. section 810; and, as the consequence is that it, being in the words of the statute, or those certain and equivalent having been employed, is valid and sufficient. *State v. Henry* (Sup. Ct. of Louisiana), 179.

38. Weight.

The weight of the corroborating evidence is for the jury. *State v. Feurerhaken* (Sup. Ct. of Iowa), 391.

INFORMATION.

1. Assault.

In a prosecution for an assault by a teacher on a child, an allegation in the information that it was committed with switches, is a charge of the means used, the only effect of which is to confine the state to the proof of such means. *Kinnard v. State* (Ct. of Crim. App. of Texas), 176.

2. Continuance.

In such case, however, where a request is made to postpone the trial for twenty-four hours, to enable the defendant to meet the testimony expected to be given by the person whose name is so indorsed, it is an abuse of discretion to deny such request, if such witness is examined on the trial, and gives material testimony for the state, in making out its case in chief. *Rauschkolb v. State* (Sup. Ct. of Nebraska), 491.

3. Indorsement of names.

In the discretion of the trial court, the names of additional witnesses may be indorsed by the county attorney on the information after the filing thereof, and before the trial. *Id.*

INTOXICATING LIQUORS.

• Druggist.

A druggist, who in good faith sells tincture of ginger as a medicine, cannot be convicted of selling intoxicating liquors because the buyer diluted the drug with water, and drank it as an intoxicant. *Bertrand v. State* (Sup. Ct. of Mississippi), 249.

JURISDICTION.

1. Courts.

Under article 81 of the Constitution, which confers jurisdiction upon the supreme court in criminal cases only, when the punishment of death or imprisonment at hard labor may be imposed, or a fine exceeding \$300, is actually imposed, the supreme court has no jurisdiction of an appeal from a judgment imposing a fine of \$15 for gambling. *State v. Case* (Sup. Ct. of Louisiana), 183.

2. Misdemeanor.

A judgment of the district court imposing upon the defendant a fine and costs for the violation of a city ordinance is a conviction for a misdemeanor, within the meaning of section 9 of chapter 96, Sess. Laws 1895, conferring jurisdiction upon the courts of appeals. *City of Burlington v. Stockwell* (Sup. Ct. of Kansas), 14.

JUROR.

1. Disqualification.

Whether the fact that a juror has formed an opinion on one or more facts of the case is a sufficient ground for challenge, is a question of fact for the court, and depends upon whether it would prevent the juror from rendering a true verdict upon the evidence. So held where a juror in a murder trial, who had formed an opinion that deceased was murdered, stated that he could render a verdict according to the evidence. *State v. Weems* (Sup. Ct. of Iowa), 282.

2. Disqualification.

A juror, whose opinion is based upon hearsay and is not

fixed and positive, is competent where he swears that he can render a fair and impartial verdict. *People v. O'Neill* (Sup. Ct. of Michigan), 337.

3. But a juror, who testifies that, if he found the testimony about equally balanced, he would render a verdict of guilty, is incompetent. *Id.*

JURY.

Waiver.

Irregularity in the organization or empanelling of a petit jury is waived, if objection is not made before entering on the trial. *Howard v. State* (Sup. Ct. of Alabama), 447.

LARCENY.

Proof.

Evidence examined, and held to sustain the conviction of the charge of larceny. *Lawhead v. State* (Sup. Ct. of Nebraska), 495.

LIBEL.

1. Candidate for office.

Every candidate for public office is amenable to public and private criticism, made in good faith, and based upon reasonable or probable cause. *People v. Glassman* (Sup. Ct. of Utah), 229.

2. A newspaper has the same right, as a private individual, to discuss the character and qualifications of a candidate for office conferred by vote of the people, being responsible for an abuse of the right. *Id.*
3. Judicial proceedings.

Where a reporter, or an editor, or a publishing company becomes the defendant in a prosecution for libel, based on a publication referring to evidence produced in the judicial proceeding, the defendant will be permitted to introduce the testimony to which such publication referred for the purpose of showing that the publication, or any portion thereof, is a fair and true report of such testimony, and, if this is shown, the

publication is so far privileged that no malice will be inferred from the mere fact of publication. *Id.*

4. In such event, in order to convict, the prosecution must affirmatively show express malice on the part of the defendant. *Id.*

5. Malice.

To rebut malice, any mitigating circumstances, or such as show a justifiable motive, may be admitted, and likewise any evidence tending to show that the charges in a libelous publication are true. *Id.*

6. Where the prosecution has introduced evidence, which tends to show that the publication was made maliciously, it is competent for the defendant to rebut such evidence, and free themselves from the imputation of malice, by showing not only upon what evidence the publication was made, but also the circumstances under which it was made, the sources of their information, and the facts tending to show the motives which induced the publication, to enable the jury to pass upon the question whether or not the publication was in fact malicious, as being made in bad faith, or without probable cause. *Id.*

LOTTERY.

What constitutes.

The offer of a choice out of a number of photographs to each purchaser of tobacco where the buyer is free to make his own choice before he takes the tobacco, is not a violation of chapter 277 of 1884. *Commonwealth v. Emerson* (Sup. Judicial Ct. of Massachusetts), 410.

NEW TRIAL.

1. Continuance.

A continuance, asked for on the fifth day of the trial, for the testimony of one already found guilty on the same charge, is properly denied. *Magruder v. State* (Ct. of Crim. App. of Texas), 173.

2. Jurors.

A new trial should not be granted upon the affidavit of jurors that they misunderstood a clear and explicit instruction. *McCullock v. State* (Ct. of Crim. App. of Texas), 164.

3. Newly discovered evidence.

Newly discovered evidence, which can be used only for the purpose of impeaching a witness, is not usually ground for a new trial. *Miller v. State* (Ct. Crim. App. of Texas), 157.

4. A new trial for newly discovered evidence, which is immaterial, should not be granted. *Magruder v. State* (Ct. of Crim. App. of Texas), 173.

5. A motion for a new trial on the ground of newly discovered evidence will be overruled where the evidence was discovered before the close of the trial. *State v. Lewis* (Sup. Ct. of Iowa), 381.

6. Venue.

A new trial will be granted where the record does not show proof of venue.

NUISANCE.

1. Streets—Obstruction.

When it is established that a party has, permanently and unlawfully, obstructed a material portion of a public street which the public have a right to use and, but for the obstruction, would use, for public purposes, it is presumed that the public have been injured and put to inconvenience by reason of the obstruction, and this constitutes, in law, an indictable nuisance. *Costello v. State* (Sup. Ct. of Alabama), 454.

2. In such case, the prosecutor need go no further and prove that such erections actually incommode the general public. *Id.*

3. Evidence is not admissible to show that public injury did not result. *Id.*

4. The rule is different where one is charged with an improper and detrimental exercise of his public right to use the street. *Id.*

5. Charter of Birmingham does not empower city to permit the streets to be diverted from their public use to private purposes, by suffering individuals to obstruct and appropriate them. *Id.*

PERJURY.

Oath.

Where the indictment charges that the defendant was sworn by "the court," it is sustained by the evidence that the oath was administered either by the judge or the clerk. *State v. Caywood* (Sup. Ct. of Alabama), 276.

POST OFFICE.

Mails—Scheme to defraud.

Schemes and acts, named in section 5480 of the U. S. R. S., are of the kind which are gainful to the wrongdoer, and no scheme or artifice which lacks this intent can be within the prohibition of the act. *United States v. Beach* (District Court, D. Colorado), 466.

RAPE.

1. Character.

Where the facts proved are such as to satisfy the minds of the jury of the guilt of the accused, character, however excellent, is entitled to very little, if any, consideration or weight. *State v. Smith* (Ct. of Gen. Sess. of Delaware), 354.

2. Confession.

The whole of what the prisoner said upon the subject at the time of making a confession should be taken together. *Id.*

3. The jury may believe that part of the confession which criminales the accused and reject that part which is in his favor, or vice versa, if they see sufficient grounds for so doing. *Id.*

4. Defense.

It is competent for the prosecution to prove that such female was under or of said age, though such indictment contains no such averment. *Id.*

5. Nor will it be a defense, if at the time of said assault he intended to commit a rape upon her, that he afterwards desisted and abandoned such intent, either because of inability to effect a penetravit, or because he was prevented by the interference of the child's mother, or for any other cause. *Id.*

6. Definition.

To constitute the statutory offense of felonious assault with intent to commit a rape, the circumstances must be such as to show that it would have been rape had the assailant carried out his attempt. *Id.*

7. In prosecutions for rape, when the fact of carnal penetration of the female under the age of consent is proven, the law conclusively presumes, without proof, that force was used, and deems the crime complete when properly charged in the indictment. *Id.*

8. Evidence.

On the trial of the issues joined by the plea of not guilty, it is error to admit evidence whose only effect is to show that others believe the accused guilty. *Jones v. State* (Sup. Ct. of Ohio), 530.

9. Indictment.

In an indictment containing an allegation as to rape, it is not necessary to aver that the female upon whom the said offense was said to have been committed, was either under or of the age of consent. *State v. Smith* (Ct. of Gen. Sess. of Delaware), 354.

10. An indictment under section 6816, Revised Statutes, for carnally knowing a female child under fourteen years of age, need not aver that she is not the daughter or sister of the accused. *Howard v. State*, 11 Ohio St. 328, distinguishing. *Jones v. State* (Sup. Ct. of Ohio), 530.

11. Witness—Corroboration.

The recollection of a witness concerning a fact in issue cannot be corroborated by the contents of a memorandum made

by himself, long after the circumstance, showing his recollection at a former date. *Id.*

REPORTERS.

Transcript.

An order will not be made in this court requiring a reporter of the district court to prepare a transcript of evidence preliminary to the settlement of a bill of exceptions, when the record discloses that a like order had been made by the proper district judge upon the precedent condition that the reporter's legal fees should first be paid, there being shown neither a compliance with such order nor any attempt to review it. *Argabright v. State* (Sup. Ct. of Nebraska), 481.

SEDUCTION.

Stepfather.

Section 3487 of Revised Statutes, 1889, which makes it an offense for a guardian or other person to carnally know a female under eighteen years of age confided to his care, applies to defiling by a stepfather. *State v. Sibley* (Sup. Ct. of Missouri), 133.

SLANDER.

Malice.

Upon the trial of an indictment for slander, an instruction that, if the jury were satisfied beyond a reasonable doubt from the evidence that the defendant said of the plaintiff "she looked like a woman who had miscarried," then he is guilty, is erroneous. *State v. Benton* (Sup. Ct. of North Carolina), 360.

STATUTES.

1. Construction.

If one use of a punctuation will cause a statute to convey a meaning, and the other use of punctuation will simply give it a collection of words without sense, the former construction should, of course, be adopted, an effect must be given to the statute. *State v. Pilgrim* (Sup. Ct. of Montana), 4.

2. Time of taking effect.

The Act of April 29, 1895, in relation to forgery, did not take effect until ninety days after the adjournment of the legislature and was, therefore, unavailable in the case tried on July 23, 1895. *Johnson v. State* (Ct. of Crim. App. of Texas), 170.

TRIAL.

1. Charge.

Under section 362 of Penal Code of 1895, on the trial for murder where the defendant attempts to testify on the ground of self defense, an instruction applying the measure of the circumstances justifying a killing in self defense to an individual of the class of men to which defendant belongs, instead of "a reasonable person," is properly refused. *State v. Cadotte* (Sup. Ct. of Montana), 8.

2. An instruction, which informs a jury that if they do not find the defendant guilty of murder in the first degree under the information, they could find him guilty of murder in the second degree, or manslaughter, or not guilty, is proper. *Id.*

3. Instruction.

An instruction as to the duty of jurors, which induces a belief that they should not consult together in making their verdict, is misleading. *Little v. People* (Sup. Ct. of Illinois), 118.

4. In a prosecution for malicious shooting at another with intent to kill, the court cannot change or modify the language of the statute in reference to the willful and malicious shooting with intent to kill so as to make it read that there must have been malice existing between the parties prior to the time of shooting. *Sapp v. Commonwealth* (Ct. of App. of Kentucky), 127.

5. Where the court, by its declarations, in the presence of the jury, and its instructions to them, determined that the defendant is guilty, it is error. *People v. Glassman* (Sup. Ct. of Utah), 229.

6. Jury.

The fact that a juror is a brother-in-law of the county attorney, who is prosecuting, does not disqualify him from acting as such juror. *State v. Cadotte* (Sup. Ct. of Montana), 7.

7. Materiality of testimony.

The question of determining the materiality of the evidence offered in a case is always one for the court, and the same rule should apply when it becomes necessary to determine whether evidence offered upon the trial of another case was material. *State v. Caywood* (Sup. Ct. of Iowa), 276.

8. Objection.

An objection to a question generally, and a refusal to satisfy, are a waiver to the right to assign error where the defect is one that could have been cured, had it been pointed out, by a mere change in the form of the question. *Little v. People* (Sup. Ct. of Illinois), 118.

9. Rejection—Testimony.

Testimony apparently inadmissible is properly rejected where counsel does not state the purpose for which it is offered and thereby show this materiality. *Pearson v. State* (Ct. of Crim. App. of Texas), 149.

10. Remarks of counsel.

Remarks of the prosecuting attorney outside of the legitimate argument, are subjects of just criticisms. *People v. O'Neill* (Sup. Ct. of Michigan), 337.

11. Where the defendant apprehends any injury from the remarks of the county attorney in his closing argument, it is his duty to ask that the court eliminate the same from the consideration of the jury, before he can be heard to complain. *Morris v. State* (Ct. of Crim. App. of Texas), 548.

12. Remarks of prosecuting attorney.

Where no exception is taken and no request for a reprimand made, improper remarks of the prosecuting attorney will not be considered. *State v. Cadotte* (Sup. Ct. of Montana), 8.

13. Withdrawing case.

The court should not withdraw the case from the consideration of the jury, because the facts and circumstances, when dissevered and disconnected, are weak and inconclusive, if their probative forces when combined may be sufficient to satisfy the jury of the guilt of the defendant. *Howard v. State* (Sup. Ct. of Alabama), 447.

WITNESS.

1. Accomplices.

The court again affirms that juries may convict on the testimony, not corroborated, of the accomplice, if they believe his testimony. 1 Greenl. Ev., §§ 372, 379; 1 Archb. Cr. Law, p. 502; *State v. Prudhomme*, 25 La. Ann. 522; *State v. Russell*, 33 La. Ann. 138; Const., art 168. *State v. Thompson* (Sup. Ct. of Louisiana), 200.

2. The decisions in the Callahan and Dudoussat Cases do not trench on previous decisions in reference to accomplices. One of these decisions holds that, if corroboration of the accomplice is attempted, it must be by that species of confirmatory testimony the law exacts in such cases. The other holds that this court will not set aside a verdict on the ground that illegal testimony was admitted to sustain that of the accomplice, when it was an issue of fact, with which the court cannot deal, whether or not the witness was a feigned accomplice or an accomplice at all. *State v. Callahan*, 17 South. 50; 47 La. Ann. 444; *State v. Dudoussat*, 17 South. 685; 47 La. Ann. 977; Const., art. 81,—limiting the jurisdiction of this court in criminal cases. *Id.*

3. Child.

In a criminal case, a boy fifteen years old, who states that the oath taken requires him to tell what is so, and that what is so is the truth, and what is not so is falsehood, and if he does not tell the truth he will be punished, is a competent witness. *State v. Cadotte* (Sup. Ct. of Montana), 7.

4. Corroboration—Accomplice.

While, upon the trial of an indictment for burglary, the jury may convict the defendant on the uncorroborated testimony of an accomplice, they are not bound to do so, nor is it the rule, that as matter of law, they are bound to accept his testimony as true, when corroborated. *People v. Shaver* (Sup. Ct. of Michigan), 316.

5. Credibility.

The credibility of a witness who has been convicted of a felony and pardoned, is for the jury, where there is some testimony against his reputation for truth and veracity. *Douglass v. State* (Ct. of Crim. App. of Texas), 161.

6. The credibility of a witness may be attacked by showing that he has been arrested and placed in jail charged with a felony; but, when so attacked, his credibility may be sustained by proof of good character for truth and veracity. *Farmer v. State* (Ct. of Crim. App. of Texas), 171.

7. Though the answer of the witness may involve his in contradictions calculated to impair his credibility, that is not a sufficient reason for excluding the inquiry, as proof by other witnesses that his statements are incorrect, would have the same effect. *State v. Vickers* (Sup. Ct. of Louisiana), 184.

8. Where defendant, as a witness in his own behalf, testified that he did not know that he was under indictment for other offenses, the indictment therefor was admissible in order to enable the jury to pass upon the defendant's credibility as a witness. *Brazos v. State* (Ct. of Crim. App. of Texas), 558.

9. Credibility—Contradictory statements.

Where, on the trial for murder, the defendant relying on self defense for acquittal, becomes a witness in his own behalf, it is competent to attack his credibility by proving statements made out of court as to the self defense, contrary to those which he had made as a witness on the trial. *State v. Cadotte* (Sup. Ct. of Montana), 7.

10. Where a witness is examined upon his cross examination with regard to matters which are immaterial to the issue in the case, the parties so examining the witness is bound by his answer, and cannot afterwards be permitted to introduce testimony in rebuttal to contradict such statements of the witness. *State v. Zimmerman* (Ct. of App. of Kansas, Southern Department, E. D.), 15.
11. Cross examination.

It is error to permit a witness to be examined on cross examination in regard to matters collateral to the main issue, and which have not been touched upon in the direct examination of the witness. *State v. Zimmerman* (Ct. of App. of Kansas, Southern Department, E. D.), 15.
12. The cross examination must be confined to the matters about which the direct testimony was given. *State v. Eifert* (Sup. Ct. of Iowa), 403.
13. A witness, called to prove an alibi, who testified that he thought of defendant when his attention was directed to the robbery, may be asked on cross examination, whether he then associated defendant with the robbery. *Commonwealth v. Flynn* (Sup. Judicial Ct. of Massachusetts), 418.
14. Evidence.

The mere fact that there was an attempt to identify a revolver as the pistol used and the attempt failed, does not render the evidence of the attempt immaterial so as to make the admission of it error. *State v. Weems* (Sup. Ct. of Iowa), 283.
15. Where the second question, by the use of the word "and," couples it to the first question, so that the answer of the one is an answer to both, when the former has been excluded, the latter question should be excluded as incompetent. *Id.*
16. On the cross examination by defendant's counsel of one jointly indicted with defendant, a question as to whether the witness thought it would benefit to tell "that stuff," is properly excluded. *Id.*

17. Examination.

When a witness has testified directly to a fact from the experience of his own senses, the extent to which he should be allowed to testify to circumstances corroborative of the truth of what he has thus sworn must rest in the discretion of the judge who tried the case. *Commonwealth v. Bishop* (Sup. Judicial Ct. of Massachusetts), 412.

18. Grand jury.

The examination of a witness before the grand jury is no part of the record of the court. *State v. Lewis* (Sup. Ct. of Iowa), 380.

19. The grand jury may examine a witness, so long as he is not required to answer questions which may incriminate him. *Id.*

20. Impeachment.

Upon the trial of such an indictment, evidence that defendant's general character for chastity is bad is not admissible to impeach him as a witness. *State v. Sibley* (Sup. Ct. of Missouri), 133.

21. When a witness for the state on the trial states an important and material fact on cross examination, which he failed to state as a witness on a former trial, this omission of the fact from his former statement cannot be used as a means of impeaching his testimony directly by the state. *State v. Vickers* (Sup. Ct. of Louisiana), 184.

22. The state cannot impeach its own witness by asking irrelevant questions, the object of which is to discredit his testimony. *Id.*

23. It is a general rule that a party cannot impeach the testimony of his own witness. *Id.*

24. After a statement by an impeaching witness to the general effect desired, and a specific denial of a fact is sought, the question should be such that the answer when given, if favorable, would amount to such a denial. *State v. Weems* (Sup. Ct. of Iowa), 283.

25. Notice.

Before the trial commenced, counsel for the prosecution, in open court, gave oral notice that certain witnesses not examined before the grand jury would be called on the part of the state, and it is held not necessarily error to allow such witnesses to testify, over an objection that said notice was not in writing and given at an earlier date. *State v. Isaacson* (Sup. Ct. of South Dakota), 311.

26. Previous declarations.

When a party is bona fide surprised at the unexpected testimony of his witness, he may be permitted to interrogate as to previous declarations made by him inconsistent with his testimony, the object being to prove the witness' recollection, and to lead him, if mistaken, to review what he has said. *State v. Vickers* (Sup. Ct. of Louisiana), 184.

27. Privilege.

Where a witness is, upon his refusal to answer questions before the grand jury, taken before the court, the court may, after fully instructing him as to his rights, direct him to return for further examination before the grand jury. *State v. Lewis* (Sup. Ct. of Iowa), 380.

28. When admissible.

If the sole effect of such interrogation is to discredit the witness, apart from statutory regulations, such evidence is not admissible; but if the purpose be to show that the witness is in error, it is admissible. *State v. Vickers* (Sup. Ct. of Louisiana), 184.

